—IN THE—

United States Circuit Court of Appeals
for the Ninth Judicial Circuit

FEBRUARY TERM 1917

LUMBERMEN'S TRUST COMPANY, Trustee, *Appellant*,

—vs.

TITLE INSURANCE & INVESTMENT COMPANY OF TACOMA, a corporation, COMMONWEALTH TITLE TRUST COMPANY, a corporation, HORACE FOGG, FRED S. FOGG, HERBERT GOVE and ALVA FOGG, administratrix of the estate of Franklin Fogg, deceased, *Appellees*.

NO. 54 E.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the Western District of the State of Washington.

FRANK H. KELLEY, JOHN H. HALL,
ROBERT M. DAVIS, FRANK C. NEAL,
For Appellants.

CHARLES O. BATES,
CHARLES T. PETERSON,
For Appellees.

J. R. ROGERS, PRINTER, PORTLAND, ORE.

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APPELLANT'S BRIEF.

This appeal presents for determination the validity of certain agreements, corporate and individual, between parties engaged or interested in the abstract business in Pierce County, Washington. Briefly stated the material and controlling facts are as follows:

1. The abstract business consists of the preparation and sale of a condensed statement in writing of the material elements of instruments filed of record which affect the title by which any given parcel of realty is held. In practice, persons engaged in this business make or possess such condensed information by taking the material facts from the official records in the

office of the County Auditor who is the official custodian thereof and the recorder of deeds. Such information in condensed form is known as "take-offs" and in addition thereto abstractors, other than the auditor, make a tract index which is a convenient and perhaps necessary aid to the prompt preparation of a correct abstract in that it shows a chain of title for each particular parcel, while the auditor keeps a grantor and grantee index only to the official records.

Such abstracts are prepared only on special order for a particular tract and consist of copies, attached together, of the condensed statement of the contents of each instrument of record affecting the title, together with a certificate of the abstractor that the abstract contains all that exists of official record which purports to affect the title to the parcel in question.

The charge for these abstracts is based upon the number of instruments abstracted, the established price being $1.00 per instrument. For the convenient and prompt preparation of abstracts, persons in the business are accustomed to keep on hand a number of copies of instruments in frequent demand which are known as "stock"; and by taking from "stock" the copies needed and adding thereto copies of particular instruments not kept in stock, abstracts are completed. Such abstract when prepared has no general market value, but has a special value to persons who are interested in the particular tract to which it pertains. In case the abstract relates to a plat, addition or tract in which conveyances are frequent, the abstract may have a slightly broader value in that it shows the general title to the whole plat,

addition or tract which is common to all the parcels thereof.

2. By the laws of Washington these public records are open to all, without charge, who desire to inspect them, or search titles, or prepare abstracts of title therefrom; and the auditor is required by law to keep such indices of the records as may be necessary for the convenient use of the records for any or all of these purposes. The law further provides that any one paying the fee therefor may require the auditor *to prepare and certify to* an abstract of title, and if the auditor neglects or refuses so to do, or if the abstract is incomplete or defective the *auditor and his bondsmen* are liable to the party aggrieved for damages occasioned thereby.

Requests for and inquiries relating to abstracts have been made frequently to the auditors, but no abstracts have been prepared by them of recent years, their custom being to refer such requests and inquiries to the abstract companies.

3. Prior to December, 1909, three incorporated companies were engaged actively in the abstract business in Pierce County. The oldest was the Commonwealth Title Trust Co., owned and controlled by the defendants Foggs and Gove, which had been in the business for many years. The Title Insurance and Investment Co. of *Washington* was owned and controlled by A. D. Willoughby and O. M. Smith. The Wilson Title and Abstract Co. was owned and controlled by R. C. Wilson,

The Commonwealth Company's powers under its articles of association were very broad, and it was authorized particularly to acquire the good will, rights, property and assets of any concern dealing in abstracts or owning an abstract plant. The Title Insurance and Investment Company of Washington was authorized by its articles to maintain and operate an abstract plant, to purchase or sell abstract plants, and generally to deal in and with all matters pertaining thereto. The powers of the Wilson Company do not appear in evidence and are unimportant in this case.

4. In December, 1909, defendant Franklin Fogg for the Commonwealth Company and A. D. Willoughby had negotiations with R. C. Wilson which resulted in the lease of the Wilson Co.'s plant to Fogg and Willoughby for a term of five years at an agreed rental, with an option to purchase the plant within two years at an agreed price, and with provisos for keeping the plant up to date and free from liens during the term of the lease. On December 7th, 1909, Willoughby assigned his interest in this lease and option to Franklin Fogg who agreed to indemnify and save harmless Willoughby from any loss or liability under the lease. That Franklin Fogg ever formally parted with his interest in the Wilson lease and option, does not appear; but it does appear that the Commonwealth Co. paid the rental under and during the term of the lease. The option to purchase was not exercised, but the lease ran its full term and at its expiration the plant was leased to the Tacoma Title Co. as hereinafter appears.

In December, 1909, the Foggs and Gove entered into negotiations with Willoughby and Smith which resulted in the sale of the plant, good will and fixtures of the Title Insurance and Investment Co. of *Washington* to the Title Insurance and Investment Co. of *Tacoma,* a corporation organized at the request and for the convenience of the Foggs and Gove to take title to the property purchased and to execute notes and a mortgage to secure the purchase price. The stock of this company was subscribed by Willoughby and two dummies who, on December 30th, 1909, turned over all its stock to the stockholders of the Commonwealth Title Trust Co. who divided it among themselves in proportion to their holdings in the Commonwealth Co. At the time he subscribed for the stock, Willoughby received from Fred S. and Franklin Fogg an agreement to save him harmless by reason of his subscription.

The purchase price of the plant was $100,000, payable $10,000 in cash, $10,000 in one year, $5,000 annually for eight years and a final payment of $40,000 in nine years; with interest on deferred payments at 7% payable semi-annually. To secure the deferred payments, notes of the Title Insurance Co. of Tacoma, and a chattel mortgage of the property purchase, *together with a set of current files of an estimated value of $25,000* (of use in and complementary to the plant) were made by the Title Insurance and Investment Co. of *Tacoma* to the Title Insurance and Investment Co. of *Washington. These current files were the property of the Commonwealth Title Trust Co., which contributed them to the security of the mortgage.*

The capital stock of the Title Insurance and Investment Co. of Tacoma was only $5,000, but the company immediately made the initial payment of $10,000 and secured title to the current files worth $25,000, all as it appears from the Commonwealth Title Trust Co. or its stockholders.

6. The mortgage provided that the plant should be operated as a going concern, kept up to date, and every endeavor made to build up its business and increase its good will. *To insure the proviso that the plant* be kept up to date and properly posted and indexed, the mortgagee was empowered to nominate a competent person to be employed by the mortgagor for these purposes, *but for no other purposes whatsoever.*

H. H. Gove resigned as an officer of the Commonwealth Title Trust Co. and took the active management of The Title Insurance and Investment Co. of Tacoma, whose business was thereafter conducted in the interests of the stockholders of these corporations, *who were identical.* Price cutting ceased, but there was no increase in the scale of charges nor any intent or purpose to make any increase.

The Title Insurance and Investment Co. of Tacoma held no meetings and elected no officers. Its by-laws called for five trustees, but none were ever elected. The affairs of the company were attended to by Gove and Fred S. Fogg as "trustees," apparently for those holding the stock of the two corporations.

7. In 1910, a competitor, the Tacoma Title Co., entered the field in active competition, doing from 10

per cent to 20 per cent of the business. In 1914, at the expiration of the Wilson lease, this company took the Wilson plant under lease and has since that time operated it, doing about 40 per cent of the business.

8. The payments of principal and interest under the chattel mortgage of 1909 were made until July, 1911, when, the Foggs having complained that the abstract business was falling off because of the general depression, and that the Tacoma Title Co. had entered the field, they were unable to meet the payments and some relief was necessary. They proposed an amalgamation of the companies, the mortgagee to take preferred stock in place of the mortgage indebtedness. Other propositions were considered, the negotiations being an endeavor on the part of the stockholders of the Title Insurance and Investment Co. of Tacoma and the stockholders of the Commonwealth Title Trust Co. to extend the time of the payment of the mortgage indebtedness, to modify its terms by reduction of the interest rate and release from the obligation to maintain the business as a going concern, and to avoid a foreclosure. The holders of the mortgage, although willing to modify its terms, sought to improve their security and to obtain the payment of the indebtedness. These negotiations resulted on December 2d, 1911, in the contracts in suit, the substance of which, in brief, are as follows:

(a) The holders of the chattel mortgage of 1909 satisfied it, and surrendered nine notes of the Title Insurance and Investment Co. of Tacoma aggregating $80,000 and payable at yearly intervals to 1919 with interest at 7 per cent payable semi-annually.

(b) The Title Insurance and Investment Co. of Tacoma executed a new series of notes aggregating $80,000, bearing interest at 5% payable semi-annually, and payable in annual installments of $2500, the first being payable December 7th, 1915; the interest on the whole indebtedness between December, 1911, and December, 1915, being payable semi-annually, and thereafter semi-annually on the net amount due after payment on the principal; any default, after one year's grace, in the payment of either principal or interest, to mature the entire indebtedness at the option of the holders of the notes. The notes provided for attorneys' fees in the usual form.

(c) To secure the payment of these notes an agreement was made that the abstract plant should be boxed and delivered to a trustee in Portland in whose custody it should remain in pledge until the indebtedness was satisfied or a court should decree a foreclosure. An appropriate corporate resolution of the Title Insurance and Investment Co. of Tacoma, authorizing the notes and the pledge of the property, was passed at a meeting of the corporation at which all its stockholders were present and consented thereto.

(d) Further to secure the payment of this indebtedness, the Commonwealth Title Trust Co. agreed to guarantee the payment of the semi-annual installments of interest up to and including December 7th, 1915, and the payment of principal and interest up to and including 1921, in accordance with the tenor of the notes; and further agreed to make the necessary "take-offs," etc., and to index and bind the same, and deliver them to

the trustee in Portland, to keep the plant up to date, with a proviso, that as long as the payments of principal and interest were made promptly, this agreement should remain in abeyance.

(e) To secure the performance of the undertakings of the Commonwealth Co., that company made a mortgage of certain real property it owned in Tacoma in the sum of $15,000. Some question having arisen as to the corporate power of the Commonwealth Co. to make these guarantees and to execute this mortgage, the individual defendants guaranteed that it had such powers and that its agreements were for a good, valid and sufficient consideration and were in all respects valid and binding on the corporation. By an appropriate corporate resolution, the Commonwealth Title Trust Co. was authorized to enter into these agreements and to execute this mortgage, at a meeting at which all its stockholders were present and consented thereto.

9. The semi-annual payments of interest were made by the Commonwealth Title Trust Co. up to and including July, 1913. The semi-annual payment of interest due December, 1914, was defaulted, although promises to pay were made. The semi-annual payment of interest due July, 1915, was defaulted. In the Spring of 1915 some of the individual defendants were advised by counsel that the agreements in suit were void as monopolistic, and in restraint of trade, and in restraint of competition. Further attempts to compromise and adjust the matters in controversy having failed, suit was brought in the court below which sustained the contention of the defendants that the agreements were void

as in furtherance of a monopoly and in restraint of competition and of trade. A decree having been entered dismissing the bill, the plaintiff appeals.

ARGUMENT.

The court below found all of the several transactions between the parties were for the purpose of creating a monopoly in the abstract business in Pierce County, and were therefore illegal and void. The court found this taint attached to the sale and mortgage of 1909 and that all subsequent agreements were in furtherance of the original unlawful purpose. The decree is based upon this finding and other matters found and discussed by the court were unnecessary and *obiter dictum*.

We submit that the court below was in error in this fundamental proposition. The abstract business is such that its very nature makes its monopoly impracticable. It is merely a convenient compilation, from sources open to all, of information relating to title to real property, which does not pretend to state in whom that title is, but merely certifies that the facts stated are all that exist of official record purporting to affect the title. It is a skilled service in so far as ability is involved to determine what facts are material, otherwise it is merely clerical. It creates no commodity having an intrinsic value, but is merely a compilation of interest to those immediately concerned. It is analogous to the reports of legal proceedings, legislative enactments, executive documents and other public matters. It bears some analogy to the collection of news, commercial reports, etc., but is of less general value. The information it contains must be di-

gested and considered to deduce therefrom the character of the title and in whom it is—a service which requires usually a legal expert, who, if competent to render this service, would be competent to obtain the facts at first hand from the official records. Thus every attorney-at-law is an inchoate abstractor of titles, who refrains from doing the work only so long as others do it more cheaply and conveniently. Any attempt of the abstractors to charge exorbitantly, or to render anything but a convenient service, would bring every attorney into the field as a competitor. Indeed, anyone may go into the abstract business at any time. The official records are open to him. If he chooses he may indirectly compel others in the business to give him necessary information. It is common knowledge that, particularly in the younger states, titles spring from the federal government or from the state. Usually donation claims, large tracts, plats, additions, etc., are the secondary sources of title. One needs only to obtain the use of a single abstract pertaining to a single parcel within each of these secondary sources, to have at his command all that the esablished abstractor has, and may run the title to any parcel within these sources from the official records rapidly, conveniently and at small expense. If his certificate is acceptable, his abstract is as good as another. Every lawyer in active practice accumulates in the course of time abstracts which cover these secondary sources of title so that, if the abstractors cease to be a convenience, his clients may become independent of them immediately.

Such abstracts cannot be considered a commodity. They are like letters, correspondence, opinions in writ-

ing, compilations, etc., of value only to the parties in interest. The certificate is a matter between the abstractor and his patron, creates no privity of contract in third persons, gives rise to no cause of action except between the abstractor and his patron, and therefore adds nothing of general value to the abstract as a commodity. The business is one of mere personal service and occupation. There is no property affected with a public interest; therefor there can be no basis laid for a charge of monopoly.

Bremerton Development Co. vs. Title Trust Co., 68 Wash. 268.

National Savings Bank vs. Ward, 10 Otto 195, s. c. 25 Law Ed. 621.

Dundee Mortgage & Trust Co. vs. Hughes, 20 Fed. 39.

Thomas vs. Guarantee Title & Trust Co., 81 Ohio St. 432, s. c. 91 N. E. 183, s. c. 26 L. R. A. (N. S.) 1210.

Rohlfe vs. Kasemier, 140 Iowa 182, s. c. 17 Ann. Cas. 750.

State vs. Associated Press, 159 Mo. 410, s. c. 60 S. W. 91, s. c. 51 L. R. A. 154, s. c. 81 Am. St. Rep. 368.

State vs. Duluth Board of Trade, 107 Minn. 506, s. c. 107 N. W. 395, s. c. 23 L. R. A. (N. S.) 1260.

Forrest Photo Co. vs. Hutchinson Grocery Co., 108 S. W. (Texas) 768.

State vs. Frank, 169 S. W. (Ark.) 333.

Davies: *"Trust Laws and Unfair Competition,"* p. 169.

Banker vs. Caldwell, 3 Minn. 94.

Vallette vs. Tedens, 122 Ill. 607, s. c. 14 N. E. 52, s. c. 3 Am. St. Rep. 502.

Heinson vs. Lamb, 117 Ill. 549, s. c. 7 N. E. 75.

Joyce: *"Monopolies,"* Sec. 69 and 99.

In *Bremerton Development Co. vs. Title Trust Co.,* 68 Wash. 268, an action for damages for defects in the abstract, the court states the rule to be: "An abstractor's liability for damages arising from negligence or want of due care in making an examination of records and in preparing an abstract of title is contractual. The weight of authority is that such liability extends only to the person by whom the abstractor was employed. There must be a contract or privity of contract to create the liability as it does not originate in tort." This is the law of the place of the contract. The principle which underlies the decision completely negatives the proposition that an abstract is a commodity of intrinsic market value which is transferred from one to another by delivery. The controlling principle is that the preparation of an abstract is a contract for a personal service which gives no right of action except between the parties. The opinion cites with approval—

Thomas vs. Guarantee Title & Trust Co., 81 Ohio St. 432, in which the complaint alleged that one Cavanaugh held a life estate in realty the title to which he employed the defendant to search. Defendant certified to Cavanaugh that his title was good. It alleged fur-

ther a custom that the owner procures an abstract and certificate of title, if he wishes to sell or encumber the property; and that the lendor or vendee relies on such abstract and certificate; that subsequent vendees or lenders rely on mere extensions of the abstract without a re-examination of the prior history of the title; and that *such abstracts and certificates circulate in the community from assignors to assignees, who rely upon them for an indefinite period of time.* It will be noted that these allegations are in effect that the abstract is a commodity having an intrinsic and general market value. In substance, it is equivalent to the testimony of defendants in the case at bar as to the nature, character and use of abstracts and the abstract business. (Testimony of Fred S. Fogg, Record, pp. 126, 128.) A demurrer having been sustained, the Court, having announced the underlying principle of decision in conformity to the rule adopted by the Supreme Court of Washington in the Bremerton case, says: "The plaintiff in error frankly disclaims any reliance upon the contract and claims his rights exist independently of the contract. The theory is that the defendant, knowing the custom alleged, a legal duty was thereby imposed upon it to make the abstract accurate; and that therefore the certificate by defendant to its employer would inure to the benefit of all subsequent grantees by 'a natural continuous sequence uninterruptedly connecting the breach with the damage as cause and effect.' It is at this point, as we think, the theory of the plaintiff breaks down. In the first place, it is elementary law that usage and custom cannot create a contract or liability where none

otherwise exists. * * * In the second place, in order to uphold the theory it would be necessary to ignore the doctrine of *caveat emptor* which requires a vendee to protect himself by investigation and express covenants. *The transaction which was the basis of this action was a mere private contract of employment for services upon a subject about which the public were not and could not be concerned."* This language most surely negatives any theory that an abstract of title can be considered a commodity in the sense that its preparation can be made the subject of a monopoly.

In *National Savings Bank vs. Ward,* 10 Otto 195, an attorney was employed by one who claimed ownership, to search and certify to title. The attorney negligently but not fraudulently failed to find a recorded deed by claimant to another, and certified to title in claimant. Plaintiff loaned on faith of the certificate and sued the attorney for damages sustained thereby. The Supreme Court held the action would not lie because the contract was for a personal service for breach of which only those in privity could maintain an action.

In *Dundee Mortgage & Trust Co. vs. Hughes,* 20 Fed. 39, the same point was decided on the same ground in this circuit.

Rolfe vs. Kasemier, 140 Iowa, 182, was an indictment of physicians and surgeons, who had agreed to a scale of charges for medical and surgical services, under Iowa statute forbidding agreements to fix prices of any commodity, etc. Held, personal services, whether skilled or unskilled, not within purview of statute and not subject to monopoly at common law.

State vs. Associated Press, 159 Mo. 410, was a mandamus proceeding to compel defendant to supply its news service and compilation of current information. The opinion is exhaustive, discusses fundamental propositions, holds defendant deals in no commodity, but renders a personal service, and is not within the terms of any statute or principle of common law, stating the rule to be: "Unless there be property to be affected by a public interest, there can be no charge of monopoly."

State vs. Duluth Board of Trade, 107 Minn. 506, was a prosecution under the Minnesota statute forbidding any contract, etc., to fix the price of any article, commodity or utility. Defendant maintained an organization for brokers in grain, gathered current information of trade conditions, market quotations, etc., and made rules requiring members to trade only with fellow members, to abide by a scale of charges, etc. Held, not to be within the terms of the statute, since it dealt in no commodity, but merely rendered personal services.

Forrest Photo Co. vs. Hutchinson Grocery Co., 108 S. W. 768, was where the plaintiff contracted to furnish to customers of defendant an art calendar on orders signed by defendant and to refrain from furnishing a like service to any other grocery concern. In defense to a suit on the contract, monopoly under the Texas statute was pleaded. The defense was held not to apply since the contract called for a service by plaintiff and not the sale of a commodity.

State vs. Frank, 169 S. W. 333, was a prosecution under the Arkansas statute prohibiting price fixing of

any article of manufacture, commodity, or any article or thing whatsoever. Defendants were proprietors of laundries who had agreed to a price scale and maintained it, but agreed further to a lower scale in a nearby town where there was competition. The Appellate Court held the subject matter of the contract was not a commodity within the meaning of the statute, and was merely a service, the business being rather to make linen clean than to make clean linen.

Davies' "Trust Laws and Unfair Competition," is an extensive treatise and compilation of the federal, state and foreign constitutional and statutory enactments by Joseph E. Davies, Commissioner of Corporations of the Department of Commerce of the Federal Government, and is published by authority of the Government by the Government Printing Office. On page 169 Mr. Davies has a compilation and comparison of the statutes of the several states and in a foot-note says that the words "articles" and "commodity" in these acts are to be construed as synonyms with natural products, manufactured products, and goods, wares and merchandise. Indeed, in two states (California and Colorado) the statute makes the specific declaration.

Banker vs. Caldwell, 3 Minn. 94, holds that an abstract of title is not a commodity, but is merely a service rendered for a compensation.

Vallette vs. Tedens, 122 Ill. 607, holds that when one requires an abstract of title, the abstractor from whom he procures it enters into a relation of trust and confidence second only to that of a lawyer to his client. In

this case the abstractor found an outstanding superior title to property which his employer owned, and purchased it. A resulting trust was held to exist by operation of law in favor of the employer. Could this result have been reached if the abstract was a mere commodity?

Heinson vs. Lamb, 117 Ill. 549, defines an abstract: "In a legal sense an abstract is a mere summary or epitome of the facts relied on as evidence of title."

Mr. Joyce, in his work on "Monopolies," states the rule adopted in several of the opinions cited: "At common law personal service and occupation cannot be the subject of monopoly; unless there is property to be affected with the public interest, there is no basis laid for the fact or charge of monopoly." Sec. 69. "Every contract or combination does not necessarily operate in restraint of trade or commerce or constitute a monopoly. To the extent that a contract prevents a vendor from carrying on a particular trade, it deprives the community of any benefits it might derive from his entering into competition. But where the business is open to all, there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. They confer no special or exclusive privilege." Sec. 99.

The opinion of the court below contents itself with a quotation from Shakespeare, a general definition from a dictionary, and a citation from Cyc. to determine adversely to our contention the fundamental question in the case at bar. In the light of reason and the weight of decided cases which we cite, we believe the preponderance of authority is with us. Indeed, Court of Appeals

of Texas has declared the dictionary's general definition obsolete; and that "commodity" in the purview of law of monopoly means something manufactured and the subject of barter and sale.

Queens Ins. Co. vs. State, 86 Texas 250.

If the fundamental facts were not sufficient to show the fundamental error of the court below, the statute law of Washington would supply the deficiency. These laws recognize the public character of records of title to realty, provide for freedom of use of the records, provide for necessary indexes of the records for the purpose of searching titles, taking notes from the records and *preparing abstracts of title.* In addition to the personal right of every citizen so to inspect and use the records, the law provides that the County Auditor, when requested so to do, shall *prepare and certify to an abstract of title,* and further provides that for refusal or neglect so to do, or for any omissions or defects in the abstract *the auditor and his bondsmen shall be liable to the party aggrieved for the damages occasioned thereby.* Private abstractors are personally liable to the person to whom their certificate is given and only to the extent of their property not exempt from execution. The auditor is liable to any one who suffers a damage by reason of his refusal, neglect or defect. The auditor therefore is compelled by law to do all and more than any private abstractor does, and his liability and that of his bondsmen is broader. How, then, can a monopoly be based upon a service which it is the public duty of a public official to perform? These provisions of Washington law are as follows, in full:

DUTIES OF AUDITOR AS CUSTODIAN.

The County Auditor, in his capacity of recorder of deeds, is sole custodian of all books in which are recorded deeds, mortgages, judgments, liens, encumbrances, and other instruments in writing, indexes thereto, maps, charts, town plats, survey, and other books and papers constituting the records and files in said office of recorder of deeds; and all such records and files are and shall be matters of public information, free of charge to any and all persons demanding to inspect or to examine the same, or to search the same for titles of property. It is said recorder's duty to arrange in suitable places the indexes of said books of record, and when practicable, the record books themselves, to the end that the same may be accessible to the public and convenient for said public inspection, examination and search, and not interfere with the said auditor's personal control and responsibility for the same, or prevent him from promptly furnishing the said records and files of his said office to persons demanding any information from the same. The said auditor or recorder must and shall, upon demand and without charge, freely permit any and all persons during reasonable office hours, to inspect, examine and search any or all of the records and files of his said office, and to gather any information therefrom, and to make any desired notes or memoranda about or concerning the same, and to prepare an abstract or abstracts of title to any and all property therein contained. Ballinger & Remington Code, p. 8795.

TO SEARCH RECORDS AND FURNISH CERTIFICATE, WHEN

The auditor must, upon the application of any person, and upon the payment or tender of the fees there-

for, make searches for conveyance, mortgages, and all other instruments, papers, or notices recorded or filed in his office, and furnish a certificate thereof, stating the names of the parties to such instruments, papers, and notices, the dates thereof, the year, month, day, hour, and minute they were recorded or filed, the extent to which they purport to affect the property to which they relate, and the book and pages where they are recorded. (Remington & Ballinger's, Sec. 8792.)

LIABILITY FOR NEGLECT OF DUTY.

If any county auditor to whom an instrument, proved or acknowledged according to law, or any paper or notice which may by law be recorded, is delivered for record * * *

4. Neglects or refuses to make the searches and to give the certificate required by this chapter; or if such searches or certificate are incomplete and defective in any important particular affecting the property in respect to which the search is requested; * * *

He is liable to the party aggrieved for the amount of damage which may be occasioned thereby. (Remington & Ballinger, Sec. 8793.)

If what has been said is not enough to show clearly that the abstract business is inherently incapable of being monopolized, the facts in evidence show the practical impossibility. If a monopoly was formed, it was on December 30th, 1909. In the Spring of 1910, the Tacoma Title Co. entered the field and in a short time was doing from ten to twenty per cent of the business. In 1911 its business had increased so that the "monop-

oly" was unable to meet fixed charges and running expenses. After 1911 the new company was doing forty per cent of the business and in 1914 took over the lease of the Wilson plant which the "monopoly" could no longer carry. The new company's business seems to have grown constantly and have been profitable and satisfactory; the "monopoly" seems to have languished and grown poorer day by day until its promoters sought to get from under by pleading their own wrong-doing. The public never has suffered in any particular. (See Record, p. 6, stipulated facts, p. 79; testimony of Fred S. Fogg, pp. 127, 128; testimony Horace Fogg, pp. 134, 135; testimony Franklin Fogg, pp. 137, 138; testimony C. E. McFarland, p. 142; testimony A. L. Swanson, p. 142.) It is a curious principle of law which permits monopolists whose plans have gone astray, to avoid the obligation of their contracts by pleading their unlawful designs. Particularly is this so when the anticipated plunder would have been theirs alone.

Even though the abstract business be held to deal in commodities within the legal meaning of the word, and the subject matter of a monopoly, was the transaction of 1909 tainted with illegality? In substance, it was the purchase of a competing plant, and a chattel mortgage of the purchased property, to secure the purchase price, enhanced materially by contribution of other property to the security. The purpose of the purchasers to control the business in the community would not render the purchase illegal. The knowledge of the vendors that such was the purpose of their vendees, would not taint it. It did not serve to diminish production be-

cause one abstract plant can serve for the "production" of a supply of abstracts limited only by the number of clerks who can inspect the records; indeed, the 1909 mortgage provided in terms that the plant was to be kept a going concern and every effort made to increase its good will and business. It did not serve to increase prices, for no such intent or purpose existed in the minds of any one connected with the transaction. It is true that for a little while at least (until the Tacoma Abstract Co. came into the field) *price cutting* ceased; but the cutting of prices had been a departure from charges which for many years had been considered by every one just and reasonable, which is a very different thing from compelling an unwilling public to pay an exorbitant charge. The vendors retained no interest in or control of the business. The opinion of the court below lays some stress on the control of the business retained by the vendors; but it is apparent from the mortgage that this control was only a right in the vendors to nominate a competent person, to be employed by the vendees, to attend to the actual entries in the record books necessary to keep the plant up to date. There was no control or participation in the policy or actual business of the vendees. Nor was the transaction complicated by the fact (frequently in evidence in the decided cases) that the purchase took the form of the acquisition of the whole or a controlling interest in the stock of a competitive corporation; but was merely the purchase of the plant of the competitor, leaving the vendor corporation with its franchise and control complete and unimpaired. Nor was there any ancillary agreement of the vendor

corporation or its officers and stockholders not to enter into competition with the vendees. It was merely a sale and mortgage to secure the purchase price of the chattels sold. The opinion of the court below gives much weight to the fact that practically at the same time the property was sold, the plant of another competing concern (the Wilson Abstract & Title Co.) was leased with an option to purchase. But this does not affect the legality or enforcibility of the mortgage. It is true that Willoughby assisted in negotiating this lease and was one of the lessees; but the record is clear that he had no actual interest, for he made an entire assignment to the Foggs the day after the lease was made and was indemnified by them against loss by reason of the lease. He had no part or share in either the benefit or burden of the lease. His participation in its negotiation would not render the mortgage invalid or unenforcible. It was no more than a sale of chattels which remotely, temporarily, and very imperfectly affected the "trade" in abstracts. It neither pretended to or could in fact give an exclusive privilege. Our position on these points is well sustained by decided cases of recognized authority:

Davis vs. Booth & Co., 131 Fed. 31.

Booth & Co. vs. Davis et al, 127 Fed 875.

Trenton Potteries Co. vs. Olyphant, 68 N. J. Eq. 507; s. c. 43 Atl. 723; s. c. 46 L. R. A. 255..

Metcalf vs. American School Furniture Co., 122 Fed. 115.

Diamond Match Co. vs. Roeber, 106 N. Y. 473.

Camers-McConnell Co. vs. McConnell, 140 Fed. 412.

Doherty vs. Rice, 186 Fed. 204.

State vs. Continental Tobacco Co., 177 Mo. 1.

Brooklyn Distilling Co. vs. Standard Distilling Co., 120 N. Y. App. Div. 237.

Atty. Gen. vs. Consolidated Gas Co., 124 N. Y. App. Div. 401.

Rafferty vs. Buffalo City Gas Co., 56 N. Y. Supp. 288.

Washington Liquor Co. vs. Shaw, 31 Wash. 398.

Hanover Nat'l Bank vs. First Nat'l Bank, 109 Fed. 431.

Standard Furniture Co. vs. Von Alstine, 22 Wash. 670.

Davis vs. Booth, 131 Fed. 31, is a case akin to the case at bar. The parties were in the business of buying, selling and catching fish—a commodity which is a necessity of life, a distinction drawn by some courts, notably those of England and Massachusetts. Davis was the principal owner of the Davis Fresh & Salt Fish Co., which did business in some sixteen cities in Ohio, Kentucky, Tennessee, Missouri, New York and Michigan. Booth purchased of the Davis Co. its properties and good will by bill of sale and Davis gave personal guarantees thereof. Davis and four others interested in the Davis Co. entered into personal agreements, collateral to the sale, to refrain from competition with the purchaser or his assigns for ten years. Booth made similar purchases and obtained like agreements from many persons engaged in the fish business, and organized a $5,500,000 corporation to which he made over the prop-

erties purchased and assigned the contracts. Davis and others having breached the agreements, Booth's assignee brought suit to restrain them. The defenses were: (a) The transaction was in restraint of trade within the meaning of the Sherman Act. (b) The transaction was within the prohibition of the Michigan statute relating to freedom of competition and trade. (c) The transaction was illegal at common law as an unreasonable restraint of trade. The trial court found no merit in these defenses, citing particularly the then recently decided case of *United States vs. Addyston Pipe & Steel Co.* (cited by counsel and the court below as a controlling authority in this case) in which Judge Taft, after reviewing the decided cases which hold the several contracts in one form and another tainted with illegality, says: "In the foregoing cases the only consideration of the agreement restraining trade of one party was the agreement of the other to the same effect, *and there was no relation of partnership, vendor and vendee, or of employer and employee.* Where such relation exists between the parties, as already stated, restraints are usually enforcible if commensurate only with the reasonable protection of the covenantee in respect to the main transaction affected by the contract. But in recent years even the fact that the contract is one for the sale of property or of business and good will * * * has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business * * * with a view to establishing a monopoly. * * * *The actual intent to monopolize must appear. It is not enough that the mere*

tendency of the provisions of the contract should be to restrain competition. In such cases, the restraint of competition becomes the main purpose of the contract and the transfer of property and good will * * * is merely ancillary to that purpose." 85 Fed. 271.

The court below having granted an injunction, Davis appealed. The appellate court sustained the court below and in the opinion Judge Severens says: "We think there is nothing in the anti-trust act which rendered unlawful the purchase by William Vernon Booth and his transfer to A. Booth & Co. of the plant of the Davis Fresh & Salt Fish Co., or which necessarily rendered invalid the agreement of the stockholders of the latter company, which was ancillary to the contract of sale. Nor can this conclusion be affected by the fact that A. Booth & Co. also purchased other plants and stocks to an extent that tended to create a power to monopolize the fish market. There is a clear distinction, which seems to be lost sight of in the argument here between the aggregation of properties by purchase, when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination. * * * It may be that the practice of acquiring by a single corporation through purchase of a great number of single plants in several states, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the law making power,

since the old law against forestalling the market has become obsolete." Referring to the defense under the Michigan statute the opinion says: "We think that the intent which made the contract or combination unlawful was one in which both parties participated, and that act was not intended to comprise a case where there was a sale and purchase of property, after which the seller should have no interest in the property, and therefore would have no intent as to its further use." The case went to the Supreme Court on certiorari where the writ was dismissed on a memorandum order. 195 U. S. 636. This case has been cited frequently; but in no case has the doctrine which we have quoted been questioned.

Trenton Potteries Co. vs. Oliphant, 58 N. J. Eq. 507, is an illuminating case which discusses principles involved here and applies them to facts and circumstances much more extreme than the case at bar. There seven managers of seven manufacturers of sanitary pottery, comprising all in the United States, excepting one or two minor concerns, entered into an association for the purpose of fixing the prices of their wares in the United States, such prices to be determined by the majority of the seven members. Afterward, an individual purchased the business, plants and good will of five of the members of the association by separate and substantially contemporaneous and similar contracts of purchase and obtained therewith the individual agreements of the vendors not to re-enter the business for a term of fifty years within the United States, except the State of Nevada and the Territory of Arizona, in which excepted districts it appeared that it was impracticable

to conduct the business. The purchased properties passed to the Trenton Potteries Co., a corporation having a life of fifty years. It was held that the contracts of purchase were valid and enforcible. We quote from the opinion: "A person engaged in any manufacture or trade, having the right to acquire and possess property and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his business was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition; at least for a time. But in the absence of legislative restrictions, if such could be imposed, upon the acquisition of such property and its use when so acquired, courts could impose no limitations. They would be compelled to enforce such contracts notwithstanding the effect was to diminish or even exclude competition. * * * It follows that a corporation empowered to carry on a particular business may lawfully purchase the plants and business of competitors, although such purchase may diminish, and, for a time at least, destroy competition. Contracts for such purposes cannot be refused enforcement." This case was tried before an able court, by eminent counsel, has been annotated and cited frequently and discussed by leading text writers. The soundness of the fundamental principles quoted has been generally approved. It has been criticised as springing from the tribunal of a state which is the "Mother of Trusts" and in jurisdictions

where express legislation has been enacted, it has not been followed; but Washington has no such legislation. It has been held to be opposed to the rules announced by Judge Taft in the Addystone Pipe case, but such holding is not sound. Briefly stated, the Trenton Potteries case holds that, unless restricted by legislation, one may purchase the business of his competitors, to any extent that his financial resources will permit, even though his purpose and the necessary result is to diminish or destroy the competition of his vendees. The Addyston Pipe case, discussing the general proposition, which was not necessary to the determination of the particular question presented therein, states the rule to be that such purchases will as a rule be upheld and enforced unless there is an unlawful purpose, in which both vendor and vendee join, to extinguish competition and create a monopoly *the fruits of which both vendor and vendee will enjoy.* These doctrines are not in conflict. Both declare the fundamental transactions legitimate; one declares that legitimate means may not be used to gain an illegitimate end. Both agree upon the one proposition which is pertinent to the case at bar: A vendor's sale is not illegal merely because it tends to or in fact does restrain competition. Both cases, therefore, sustain our contentions.

Metcalf vs. American School Furniture Co., 122 Fed. 115, was a stockholder's suit to set aside a sale of all the assets of defendant for a small cash consideration and stock in the American company because the purpose was to create a monopoly and to restrain competition. The court held the sale valid and enforcible, say-

ing: "Assuming the American Company to have been organized for the express purpose of controlling the sale, price and manufacture of school furniture in the United States, and that the directors of the Buffalo company aided in the general undertaking to incorporate such company and to acquire by purchase the good will and assets of other concerns engaged in similar industries, will the sale by the president and secretary of the Buffalo company, pursuant to a vote of ratification by a majority of the stockholders, be valid? I am unable to find express authority holding such a sale to be invalid."

Diamond Match Co. vs. Roeber, 106 N. Y. 473, was a suit to restrain defendant from breaching an agreement not to invade the good will of a business sold by him. The defense was that the agreement was in restraint of competition and unenforcible. Judge Andrews stated the rule: "We are not aware of any rule of law which makes the motive of a covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition; and the validity of the contract (not to enter into competition), if supported by a consideration, will depend upon its reasonableness as between the parties."

Camors-McConnell Co. vs. McConnell, 140 Fed. 412, was also a suit to restrain a vendor who had agreed to protect the good will of the business sold. The defense was restraint of trade and monopoly. The court states the rule: "The sale and transfer by a person of

his property and good will to another cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of trade."

Doherty vs. Rice, 186 Fed. 204, was a case which arose in the Fifth circuit. Defendant owned and agreed to sell to plaintiff eight hundred shares of a power and lighting company and agreed further to procure plaintiff the sale of the remaining two hundred shares. Plaintiff owned and controlled a competing company. In a suit to compel performance, defendant pleaded that the contract was void and unenforcible as tending to create a monopoly. The trial court, conceding that such was the purpose and intent, declared the agreements legal and decreed specific performance. On appeal this ruling was upheld (see 184 Fed. 878). It will be noted that defendant not only agreed to sell his own stock, but agreed to procure the sale of stock owned by others, thus participating in the transaction fully as much as did Willoughby in the case at bar.

State vs. Continental Tobacco Co., 177 Mo. 1, was a *quo warranto* to oust defendant under the Missouri statute which forbids a corporation to create or enter into any agreement to control prices, etc. Defendant had bought the business of a competitor and closed down its factory. Held, that defendant's acts were lawful both at common law and under the statute.

Brooklyn Distilling Co. vs. Standard Distilling & Distributing Co., 120 N. Y. App. Div. 237, was a suit

for rent. The defense was that the lease was made in furtherance of a scheme to eliminate competition and to form a monopoly. Held, that landlord could recover, as there was no participation in the unlawful purpose beyond taking the rent money.

Attorney General vs. Consolidated Gas Co., 124 N. Y. App. Div. 401, was a *quo warranto* to oust defendant corporation under the New York statute. Six companies had consolidated and then acquired the whole or a control of the stock of competing companies. It was held that, although the purpose was to prevent competition, the acts of defendant were lawful, since, under the circumstances of the case (the legislature having the power to control prices, and the field being open for other similar enterprises), no exclusive right was obtained.

Rafferty vs. Buffalo City Gas Co., 56 N. Y. Supp. 288, holds that an exclusive privilege or right is indispensable to the existence of a monopoly; that a contract by a gas company to issue its stock in exchange for the stock of a competing company to prevent ruinous competition is not a combination to create a monopoly, inasmuch as no exclusive privilege or right as against individuals or other corporations to manufacture and sell gas is acquired.

Washington Liquor Co. vs. Shaw, 31 Wash. 398, was an action to recover for goods sold. The defense was that plaintiff knew the goods were to be used for an unlawful purpose. The court held such knowledge did not preclude a recovery.

Hanover National Bank vs. First National Bank, 109 Fed. 431, holds that a contract in the consideration and performance of which nothing illegal or against public policy inheres, may be enforced, though it may incidentally aid one in violating a law. One who has received the benefit of such a contract cannot successfully defend on the ground that he intended to or was enabled thereby to do some illegal act which was neither a part of the consideration or of the performance of the agreement; nor would mere knowledge of the other party of such intent or purpose operate to change the rule.

Standard Furniture Co. vs. Van Alstine, 22 Wash. 670, was a case where plaintiff had made a contract of conditional sale of furniture with two women, who to the knowledge of plaintiff were engaged in and intended to use the property purchased for an illegal and immoral purpose. In an action in the nature of replevin to recover the property the court held that the action was properly dismissed, because the title to the property remained in the plaintiff—the purchasers having a mere right of possession. In the opinion Judge Fullerton states the law:

"It is true that it is held in many well considered cases, and it is perhaps the weight of authority, that mere knowledge on the part of a vendor of goods that the vendee designs to and will put them to an immoral or illegal use, is not of itself sufficient to bar an action brought to recover the purchase price of the goods sold. But in all of the cases announcing this rule which have been brought to our attention, the transaction was one

in which the owner of the goods at the time of their delivery to the vendee parted with his title and right of possession, so that thereafter the relation between the vendor and vendee was that of debtor and crditor merely, *or that of debtor and creditor with a mortgage over to secure the deferred payments of the purchase price.* The sale and delivery of the property was complete, and no element of participation or aid in the immoral or illegal design of the vendee could be imputed to the vendor. * * * Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without let or hindrance from his vendor. Under an ordinary contract of conditional sale the law is different." * * *

THE SECOND ASSIGNMENT OF ERROR.

We have discussed with some prolixity our reasons for asserting that the agreements of 1909 were valid and enforcible and for assigning as error the holding otherwise of the court below. If we have been prolix it is because we feel that the underlying principles apply as well to other matters in which we believe the court below erred. We admit that if the court below was not in error as to the transactions of 1909, there is no reversible error in the record.

What was there in the transactions of 1911 to render invalid and unenforcible the valid and enforcible obligations of 1909? This was the situation. The Title Insurance & Investment Co. of Tacoma owed $80,000 to the Traders Trust Co. of Oregon as assignee of the Title Insurance & Investment Co. of Washington, secured by mortgage. It was unable to pay, and default would lead to foreclosure. The Title Insurance & Investment Co. was really the Foggs and Gove. The Traders Trust Co. was really Willoughby and Smith. Gove was the ostensible manager of the Title Insurance & Investment Co. Horace Fogg was the president of the Commonwealth Title Trust whose stockholders were identical with the stockholders of the Title Insurance & Investment Co. Horace Fogg took up with Willoughby the matter of a readjustment of the Title Insurance & Investment Co.'s indebtedness. It is somewhat significant that the president of the Commonwealth Title Trust Co. should undertake these negotiations if the separate corporate interests were so material and significant as the testimony of the individual defendants

would lead the court to believe. The Foggs could not pay and did not want to be foreclosed. Willoughby and Smith wanted their money as agreed or the security foreclosed; or new terms of payment with improved security. Gove, the ostensible manager of the corporation which owed the debt, took little or no part in the negotiations. The Foggs on the one side and Willoughby and Smith on the other, threshed the matter out. All seem to have been good traders and competent to protect their several interests. Both had the advice of eminent counsel; neither had any purpose to do anything unlawful or unfair. The final adjustment was:

(a) Willoughby and Smith surrendered the $80,000 in notes runing for eight years and bearing interest at seven per cent, and accepted in lieu thereof notes for $80,000 running for thirty-two years at five per cent.

(b) Willoughby and Smith satisfied the chattel mortgage which obligated the mortgagor to keep the plant a going concern and up to date in every particular —a security which under the terms of the mortgage was increasing in value year by year and would have cost to keep up to date, as the evidence shows, not less than $35,000 when the mortgage matured. Thus they surrendered a security which was of continuingly increasing value for a debt which was materially decreasing in amount year by year. They took in lieu thereof an agreement of pledge of the property, releasing the obligation to keep the business a going concern, and conditionally releasing the obligation to keep it up to date. Thus they accepted a security of continuing decreasing value year by year for a debt which decreased but slowly.

(c) To replace in part their impaired security, Willoughby and Smith accepted the guaranty of the Commonwealth Title Trust Co. of so much of the principal and interest as matured up to 1921; and the agreement of the company to supply the material necessary to make the plant up to date in case these payments were defaulted. To secure the performance of the Commonwealth's guarantee and agreement, they took a mortgage on some of its property. As a further protection, they took the personal warranty of the Foggs and Gove that the Commonwealth's guaranty and agreement was a valid and subsisting obligation of that company.

(d) The Title Insurance & Investment Co. of Tacoma received its notes and the cancellation of its mortgage. It gave the new notes and executed the contract of pledge. There can be no question that it received a full, valid and very valuable consideration for its agreements. It owned the property which was pledged. It was burdened by no public duty relating to the same and could operate it or not operate it as its interests might dictate. It desired to be released from the burden and expense of its operation, imposed upon it by a private contract, and preferred to put it in pledge. It had a full and lawful right so to do. In legal contemplation, the transaction differed in no way from that of a workman who puts his tools in pledge to a pawn broker over a Saturday night. Standing alone, it would require a nimble legal wit to find a pretense to attack its validity. The temperature of a "cold storage" to which the individual defendants refer so per-

sistently in their testimony is no lower than the frozen face and surroundings of the average pawn broker.

(e) The Commonwealth Title Trust Co. had in peril of foreclosure the property it had contributed to the security of the mortgage of 1909. Its stockholders bore the burden of the expense of keeping and feeding two outfits to do the work of one. The earnings of the abstract business were sadly burdened by the outgo for principal and interest, and only a sum thus depleted was available to the Foggs and Gove either for salaries or dividends. They wanted this drain stopped so that salaries should once again flow freely. They owned the Title Insurance & Investment Company. They owned the Commonwealth Abstract Co. Relief for one was relief for the other and all for the Foggs and Gove. They were willing to pledge both for relief. They got it. They do not want to pay for it. That is about all there is to it. A court of conscience should not be quick to aid them. Their ground of defense leads us to

THE THIRD ASSIGNMENT OF ERROR.

Neither the sale and mortgage of 1909 nor the several contracts of 1911 contain any reference to an understanding that Smith and Willoughby were to keep out of the abstract business in Pierce county during the life of the contracts. However, it is but fair to say that such was the general understanding, although there was no specific agreement to that effect, oral or in writing. By a letter bearing date of Dec. 2nd, 1911, but which it is admitted was not written or delivered until the other writings were signed and delivered, Willoughby and Smith agreed so to do, and they have kept their agreement to its spirit and letter. The Foggs testify, however, that such an agreement was discussed and agreed to in the negotiations which preceded the agreements of 1911 and was omitted from the more formal papers by an oversight which was supplied by the letter in evidence. It is admitted, however, that there was no such omission by any oversight in 1909 (although the Wilson lease contained a specific clause covering the subject matter. See Record, p. 107, par. 5). It is somewhat difficult to perceive what change in conditions required that such an agreement became a material matter in 1911, running through all the negotiations, as the individual defendants testify. Willoughby and Smith testify that nothing was said on this subject until after the main contracts were signed and delivered. Their counsel, Elmer M. Hayden, testifies that he never heard of it during the negotiations, and did not know such a writing existed until a short time before he testified at the trial. The letter itself recites: "In consideration of the agreements which *have been* this day made," etc., which shows that

in the mind of the writer these agreements had been already made. Willoughby testifies that after all the agreements had been reached and the writings signed, he had a conversation with one of the Foggs in which he said that he had no intent or purpose to re-enter the abstract business in Pierce County and would not do so; nor did he believe that Smith would do so; but that in a sale of a business in Portland in which Smith was interested, he had agreed to keep out of the business and had afterward broken his agreement, which led to a lawsuit. Thereupon Fogg stated that he would trust Willoughby but would not trust Smith, and requested Willoughby to get an agreement in writing from Smith which Willoughby did and delivered it some time after the other matters were closed. We believe the weight of the evidence sustains Willoughby, particularly as none of the defendants have any memory of the matter except in the most general way, and the specific conversation with Willoughby was not denied, and the surrounding circumstances serve to corroborate him. However, the question is unimportant except as it affects the general weight to be given to defendants' testimony on other and more material matters—notably the character and manner of conducting the abstract business. We do not want to be understood as charging any of the defendants with want of frankness or fairness beyond the natural bias of an interested party to see things in his own way, particularly where his case is weak.

If the agreement was subsequent and separate it is of course without consideration and void; but its invalidity would not taint the principal agreements.

If the contract was ancillary to the principal agreements and was supported by a valid consideration, the protection was no broader than that which was reasonably necessary to the covenantees. It was limited in terms to Pierce County. It ran no longer than the principal agreement. It was reasonable, and did not injuriously affect any public interest.

In the consideration of these questions it is well to bear in mind the distinction between contracts in restraint of trade and contracts in restraint of competition; otherwise, confusion arises and cases appear to be contradictory which are not so in fact. In *Fisher Flouring Mills vs. Swanson,* 76 Wash. 649, Judge Ellis makes this clear: "The question is thus reduced to the inquiry whether at common law the contract here involved is violative of any canon of public policy. In considering this question much confusion may be avoided by marking the distinction, not always observed in the adjudicated cases, between those contracts which, since the earliest history of the law on the subject, have been designated as 'contracts in restraint of trade' and those more correctly designated as 'contracts in restraint of competition.' The term 'contracts in restraint of trade' has so long been applied to undertakings not to pursue a particular profession, trade, or business, and has so thoroughly acquired that conventional significance, as to render its use in any other connection confusing."

The principal distinctions are: (a) Contracts in restrain of trade are personal restrictions, and the public is but remotely interested therein. Contracts in restraint of competition are not in the nature of personal

restrictions, and the public interest is the principal question involved. (b) Contracts in restraint of trade may properly relate to the practice of a profession, skilled service, positions of trust and confidence; good will of a business or occupation; and the particular use of a thing bought or sold, either by a vendor or vendee. Contracts in restraint of competition relate only to commodities which are the subject of commerce, barter and sale; or to services which are impressed with a public or quasi-public duty. (c) Contracts in restraint of trade are valid only when they are ancillary to a principal contract usually of sale, partnership or employment. Contracts in restraint of competition are valid or invalid without reference to whether they are principal or ancillary. Reported cases are often misleading unless, as Judge Ellis pointed out, they are read with these distinctions in mind.

The growth of the law on both of these questions makes interesting reading; but, as to contracts in restraint of trade, the interest is historical only since the opinion of the Supreme Court in *Oregon Steam Navigation Co. vs. Winsor* (infra) which rendered further discussion like "taking coals to Newcastle," as Judge Platt of the First Circuit, stated in *National Enamelling Co. vs. Haberman* (infra). That case adopted the "rule of reason" as the basis of decision, and has been followed in every jurisdiction where the English language obtains until citation becomes wearisome. The rule is well expressed in *9 Cyc. (Contracts) 529* as follows: "A doctrine has been introduced in some of the later cases, both English and American, which may be

called the doctrine of the reasonableness of the restraint. This rejects entirely the fixed rules stated in the last section (rules as to the limit of time and space) and decides each case according to its peculiar circumstances. It makes the validity of the restraint depend upon the question whether it is such as to afford a fair and reasonable protection to the party in favor of whom it is imposed. If it is, it is upheld; but if it goes beyond this and imposes a restraint greater than is necessary for the protection of the party, it is declared void. This doctrine is founded upon the idea that public policy requires that when a man by his skill or by any other means obtains something which he wants to sell, he should be at liberty to sell it in the most advantageous way; and, in order to enable him to do so, it is necessary that he should be able to preclude himself from entering into competition with the purchaser; and therefore the same public policy which enables him to do that should not forbid him from alienating what he wants to alienate, but should permit him to enter into any stipulation, however restrictive it may be, provided such restriction is not unreasonable, having regard to the subject matter of the contract. Hence a stipulation by the vendor of any trade, business or profession, that he will not exercise the same trade or business so as to interfere with the value of the trade, business or thing purchased, is reasonable and valid."

At common law a restriction which was limited by space to that in which the subject matter of the contract was of value, was always valid although unlimited as to time. (See *9 Cyc., p. 527.*) That particular

rule might fall in a proper case before the rule of reason, but not in the case at bar because the restriction here is co-extensive with the life of the principal contract. It served only to protect from competition during the very life of the principal agreement and within the territory which was restricted by the peculiar nature of the abstract business to the county whose records formed its basis.

A more difficult question is whether under the particular circumstances of this case the contract was ancillary to a contract of sale. It is true that the contract of 1909 was a sale no part of the consideration of which was an agreement by any one to refrain from exercising the business or calling beyond a vague understanding to that effect which could not be the basis of any right or liability in law or in equity. The substance of the agreements of 1911 was a re-arrangement as to the consideration of the sale of 1909, and the security for the payment of the purchase price rather than a new sale. The parties changed the consideration and security, not in amount, but in detail; and a part of this change was the collateral or more properly ancillary agreement not to compete. Probably this construction would have been necessary if the ancillary agreement had been written within the four corners of the principal agreements of 1911; and, taking the testimony of the individual defendants as true, this was a part of the changed consideration which was omitted by mistake. But would the defendants have been heard to assert it, if the letter in writing setting out the agreement were not in existence? The principal agreements were com-

plete in themselves and contained no hint of the ancillary agreement. Their tenor, force and effect could not have been altered, changed or destroyed by an antecedent oral agreement not contained in the writings.

If the construction to which we have referred is not adopted, then clearly the agreement contained in the letter is separable and becomes a nullity. As we have hereinbefore pointed out, the letter itself recites: "In consideration of the agreements which have been this day made between you," etc., etc., which clearly refers to a past completed transaction and does not attempt to recite that the agreement was a part of the consideration of the agreements already concluded. Such a consideration as that recited would not sustain the contract.

Many of the cases which we have already cited sustain the position which we take.

Davis vs. Booth, supra, holds a restriction, covering six states and running for ten years, is reasonable and valid.

Trenton Potteries Co. vs. Olyphant, supra, holds a restriction, covering substantially the entire United States and running for fifty years, is reasonable and valid.

Diamond Match Co. vs. Roeber, supra, holds a restriction, covering substantially all the United States and running for ninety-nine years, is reasonable and valid.

Other authorities are:

Oregon Steam Navigation Co. vs. Winsor, 20 Wall. 64.

National Enamelling Co. vs. Haberman, 120 Fed. 415.

Knapp vs. Jarvis Adams Co., 135 Fed. 1008.

Walker vs. Lawrence, 177 Fed. 363.

American Brake Beam Co. vs. Punge, 141 Fed. 923.

Hall Mfg. Co. vs Western Steel & Iron Works, 227 Fed. 588.

A. B. Dick Co. vs. Fuller, 213 Fed. 98.

Washington Charcrete Co. vs. Campbell, 72 Wash. 566.

Canaday vs. Knox, 43 Wash. 567.

Loutzenhiser vs. Peck, 89 Wash. 435.

Ragsdale vs. Nagle, 106 Cal. 332.

Cleaver vs. Lenhart, 182 Pa. St. 285.

Zanturjian vs. Boornagian, 25 R. I. 151.

24 Am. & Eng. Ency. of Law, 841, Sub. Nom. "Restraint of Trade."

Oregon Steam Navigation Co. vs. Winsor, 20 Wall. 64, went up from this circuit. A steamboat had been sold by California owners with a restriction that the craft should not be employed in California waters for ten years. Three years later the craft was sold with a restriction that she should not be employed in California waters or the Columbia river and its tributaries for ten years from the date of the latter sale; a bond being given

to secure the performance of the restriction. The Supreme Court held the restriction valid. After reviewing the legal history of the doctrine of restraint of trade, the court announces the rule of reasonableness of the agreement as the measure by which its validity is to be determined, and says: "A stipulation by a vendee of any trade, business or establishment that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade, in which he is himself engaged, that it shall not be used within a reasonable region or distance so as not to interfere with said business or trade, is also valid and binding. The point of difficulty in these cases is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. And it is obvious, at first glance, that this must depend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that the stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand a stipulation is not objectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not

violate the two indispensible conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertion." It should be noted that three of the ten years within which the California vendor had stipulated that the craft should not be used in California waters had expired. The restriction of ten years as to those waters was obviously unnecessary. The court held that this would not invalidate the agreement, but that the contract was divisible and good for the seven years remaining.

National Enamelling Co. vs. Haberman, 120 Fed. 415, arising in the First Circuit, held that an agreement unlimited as to time and covering the whole United States was unobjectionable under the circumstances of that case.

Knapp vs. Jarvis-Adams Co., 135 Fed. 1008, arose in the Sixth Circuit. Judge Severens held that with respect to territory the restriction might be as broad as the territory within which the business to be protected was likely to go. (Cited in *Wash. Charcrete Co. vs. Campbell, infra.*)

Walker vs. Lawrence, 177 Fed. 363, arose in the Fourth Circuit. Judge Brawley held that a restriction which required a vendor to move away from the place where the business was and to reside elsewhere for a term of years was valid under the circumstances of the case.

American Brake Beam Co. vs. Punge, 141 Fed. 923, arose in the Sixth Circuit. Judge Grosscup held that

an agreement of a patentee to remain out of the brake beam business in the United States during the life of the patent should be upheld.

Hall Mfg. Co. vs. Western Steel & Iron Works, 227 Fed. 588, arose in the Seventh Circuit. The holding of the court below was reversed and the rule stated: The validity of a restrictive covenant in a contract of sale of a business and good will is to be tested, not by whether it is limited or unlimited as to time or place, but by determining whether on the facts of the particular case the restraint is greater than is reasonably necessary for the protection of the purchaser.

A. B. Dick vs. Fuller, 213 Fed. 98, arose in the Second Circuit and held that a restraint running during the life of a patent, the sale of which was the subject matter of the principal agreement, was valid under the rule that a restraint not longer than is requisite for the necessary protection of the party with whom the contract is made is not illegal.

Washington Charcrete Co. vs. Campbell, 72 Wash. 566, was a sale of a manufacturing business and an agreement of the vendor not to compete for five years either in Oregon or Washington. The court upheld the agreement, stating the rule: "We are satisfied that the general rule, as supported by the great weight of authority, is that, where a vendor sells the good will of a business, *he is bound by any covenant which is reasonably necessary for the success of the business or the preservation and protection of the property which he sells. The limit of time and territory contained in such*

covenant depends for its validity upon the character and extent of the business, as existing at the time of the sale, and reasonably to be anticipated as necessary for the successful conduct of the business in the future." These contracts are Washington contracts, are subject to *lex loci contractus.* The Washington courts adopt the rule of reasonableness as the one rule of decision.

Canaday vs. Knox, 43 Wash. 567, was a suit to recover a penalty for breach of an agreement to refrain from competition. Defense was, no breach and contract void as against public policy. Court below sustained demurrer to evidence. On appeal the Supreme Court reversed the judgment and sent case back for further proceedings. The case came again to the court (48 Wash. 685) where judgment for plaintiff below was sustained, court holding the amount of the penalty could be recovered as liquidated damages.

Loutzenhiser vs. Peck, 89 Wash. 435, was an injunction suit to restrain defendant from violating an agreement not to compete, the agreement being ancillary to a sale. Defense was, the contract was without limitation as to time under the peculiar and inapt wording of agreement. Appellate court held injunction properly granted.

Ragsdale vs. Nagle, 106 Cal. 332, was a suit to restrain vendor, who had been in partnership with vendee, for breach of agreement not to compete on dissolution of partnership and sale of plant and goodwill. The business was an abstract and title searching business in Sonora County. Agreement was that vendor would not

carry on an abstract business in Sonora County as long as vendee should carry on a like business therein. Vendee organized a corporation to which the title of plant, etc., was conveyed; but vendee's purpose was to borrow on the stock of the company as collateral, all of which he owned except a few shares held by accommodation directors. Vendee carried on the business personally, the corporate organization remaining dormant. Held, that agreement was valid and injunction properly granted. This case has been cited and approved in *Gregory vs. Spickes*, 42 P. 577, and the very recent case of *Akers vs. Rappe*, 158 P. 131, where a restriction running twenty years was upheld and approved.

Cleaver vs. Lenhart, 182 Pa. St. 285, was a sale of business under an agreement in writing which contained no restriction. Twenty days later the parties made an agreement in writing which recited that in consideration of the purchase of the business the vendor agreed to refrain from competition. Held, the agreement was without consideration and failed for that reason.

Zanturjian vs. Boornagian, 25 R. I. 151, was a sale of business and goodwill under a bill of sale with an alleged oral agreement not to compete. Also alleged subsequent agreement to make written agreement not to compete. Held, oral evidence to enlarge bill of sale inadmissible to cover matters agreed to but not included therein. Held, further that subsequent agreement was without consideration.

In several states, restraint of trade has been the subject of statutory enactments. California (Civil Code, P. 1673) provides that one selling the goodwill of a business may covenant to refrain from carrying on a

similar business within a specified county so long as the buyer, or any person deriving title to the goodwill, carries on a like business therein. South Dakota has a similar statute. (Rev. Civil Code, P. 1278.)

24 *Am. & Eng. Ency. of Law,* 841 et. seq.; *"Restraint of Trade."* There is no better or clearer epitomized statement of the controlling principles than is contained in this article. It states that at all times since the leading case of *Mitchell vs. Reynolds,* 1 P. Wms. 181, (A. D. 1711) contracts in restraint of trade which were limited to a county were held valid (p. 843), although not limited in time (p. 847). The court below fell into error in determining the particular point herein presented because the court took as the standard of reason that which appeared to be reasonable to the mind of the court rather than that which the legislation of Washington and other states, the public statutes, and judicial decision had determined and defined as reasonable. That the latter is the true standard is clearly pointed out in *U. S. vs. Trans-Missouri Freight Asso.,* 58 Fed. 58, in dealing with a cognate question: "In considering that subject we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its constitution, laws and judicial decisions. So far as they disclose it, it is our province to learn and enforce it; beyond that it is unnecessary and unwise to pursue our inquiries."

FOURTH ASSIGNMENT OF ERROR.

The court below held the contracts of 1911 were void and unenforcible as within the inhibition of the Washington Constitution, Art. 12, Sec. 22, as follows:

"Monopolies and trusts shall never be allowed in this state, and no incorporated company * * * in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or trustees or assignees of such stockholders * * * or in any manner whatsoever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section." * * *

By its terms this provision of the constitution is not self-executing. The Supreme Court of Washington has so held. *Northwestern Warehouse Co. vs. Oregon Ry. & Nav. Co.,* 32 Wash. 218. Washington has no statute which by any stretch of the imagination applies to contracts such as are under consideration here. It has legislated freely in regard to contracts of common carriers and of public service corporations; and has twice enacted statutes upon cognate subjects—once, forbidding commission merchants to combine to regulate the price of farm and garden products (Bal. Rem. Code, Sec. 7032), and again to pass a statute, carefully limited to *associations not formed for profit,* forbidding combinations to fix or regulate the price of commodities (Bal. Rem. Code, Sec. 3762). It is significant, at least, that, having the subject matter twice under consideration, the law-making power of Washington has twice refrained from giving to the constitutional provision any-

thing like the broad and comprehensive scope which the court below gave to it. Indeed, the Washington court gave this fact more than mere significance and held that the court was controlled thereby. After holding the clause to be not self-executing, and referring to legislation thereunder, the court says: "The legislature has therefore construed this section of the constitution as not self-executing and we think its construction the correct one. It follows, therefore, that whatever rights the respondents have in the premises must be determined by the terms of the statute * * * and that *courts may not enlarge upon the statutory provisions, even though the legislature might possibly do so within the terms of the constitutional limitation.*"

But if the section were self-executing, the contracts in suit would not be within its provisions. Monopolies, strictly speaking, can only be created by grant of or through the sovereign power, and operate to withdraw that which was before a common right and vest that right in one or more individuals to the exclusion of all others. (*Charles River Bridge Co. vs. Warren Bridge Co.,* 11 Peters 420.) By loose usage, "monopolies" has come to mean, both in the written and unwritten law, contracts, agreements and combinations in restraint of competition. Giving the word this broader meaning, the contracts in suit would not come within the constitutional inhibition. It is familiar rule that all the parts of a constitutional provision are to be considered together, and that a particular word or a particular phrase is not to be considered apart from the context to control the legislative meaning or broaden the scope of a constitutional

provision. Standing alone, the phrase, "Monopolies and trusts shall never be allowed in this state," has no meaning and affords no rule by which even the most learned and intelligent can determine whether or not a proposed cause of action is legal or illegal. Unless it is defined by other parts of the constitution, it is inoperative until the legislature has given to it a definite meaning. Until that which is indefinite becomes definite and certain, neither public nor private rights attach, nor public nor private duties become operative. To follow the course of the court below is to ignore the very definition of the law; for "law is a rule of human conduct, prescribed by competent political authority, commanding certain things as necessary to and forbidding other certain things as inconsistent with the peace and order of society." If, in legal contemplation, there is no certainty, there is no law.

Cooley: Constitutional Limitations, p. 100: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which these principles may be given the force of law."

This principle is adopted as a rule of construction in Washington. The constitution has a provision for taking private lands for private ways of necessity; but when *Long vs. Billings,* 7 Wash. 267, was decided, the legislature had made no provision therefor. In a suit to enforce the right under the constitution, the court in

that case said: "Before any such right can arise the legislature must define private ways of necessity, authorize persons to apply for them and prescribe the method by which the necessary land is to be taken. The constitution gives no higher right than permission to the legislature to take private lands for merely private roads."

But "Monopolies and trusts shall never be allowed in this state," which the court below cut from the general body of the section, and to which it gave controlling importance, does not stand alone. It is joined conjunctively to the remaining parts of the provision which forbid combinations, contractual or otherwise, which *have for their purpose* (a) to fix the price, (b) to limit the production, (c) to regulate the transportation of products and commodities.

The contracts in suit did not have for their purpose and did not in fact fix the price of anything unless it was the purchase price of the plant and business sold. Nor did these contracts limit the production of anything—product, commodity or anything else. There never was, nor in the nature of things could there ever be, any scarcity of abstracts, nor could the abundance of abstracts have any effect, since abstracts are procured for particular tracts, and the certificate thereof obtained for a single transaction. Certainly there was no question of transportation involved.

Nor is the constitutional provision to be broadened to include that which is not set forth therein. It is an equally familiar rule that where a constitutional provision forbids certain things and sets forth in terms the

kind and character of the things forbidden, the maxim, *"Expressio unius est exclusio alterius,"* is properly applied; and nothing is forbidden except those things which are within the definition. In construing this particular section the Supreme Court of Washington has so limited its scope. In *Woods vs. Seattle,* 23 Wash. 1, the court says: "The prohibition is directed against combinations between corporations or individuals made 'for the purpose of fixing the price, or limiting the production or regulating the transportation of any product or commodity,' and it is combinations of this character and for these purposes that constitute the monopolies and trusts which the constitution inhibits."

Properly construed, the provision of the constitution means no more than this: The legislature is *directed to determine and define* what contracts, combinations, etc., which *have for their purpose* (a) fixing the price, (b) limiting the production, (c) regulating the transportation of products and commodities, are *in the judgment of the legislature* monopolistic and in restraint of competition; and to forbid such contracts, etc., under penalties. The legislature has exercised its judgment and discretion and has never yet and never will brand as illegal contracts such as are here in suit. There remains no field within which a court may determine other contracts are within the constitutional inhibition.

The construction of its constitution by the Supreme Court of the State of Washington controls the federal courts in all matters except those in which a federal question is involved; for each state of the union has the right to construe its own constitution and its own

laws, and its construction is final and binding. *Fairfield vs. Gallatin County,* 100 U. S. 47; s. c. 25 Law Ed. 544. If these contracts are illegal, they are tainted by some provision of common law, and not by force of any constitutional or statutory enactment. At common law contracts and combinations which effectually gave to a few the control of a trade in commodities, to an equally effective exclusion of the many, were illegal, not because of inherent taint in the subject matter or want of capacity in the parties, but on the broad ground of public policy, which regarded contracts and combinations in restraint of competition as a misuse, to the public injury, of the right of freedom of contract. The growth of the law on this question has followed an almost exact parallel with the development of the law of restraints of trade, which originally condemned all restraint of individual activity within the trade, then relaxed the rule by adopting more or less arbitrary distinctions of time and place, and finally discarded all such arbitrary rules for the "rule of reasonableness" as the one principle of decision. So in contracts in restraint of competition, some of the earlier decisions condemned even that which tended merely to relax competition; later more or less elastic standards of the *extent* of the control of supply and of prices were adopted, which differed greatly in different jurisdictions; but today the strong tendency, if not the accomplished result, is to abandon these unsatisfactory standards for the "rule of reason," which takes into consideration the circumstances of each particular case and decides it in ac-

cord with the public policy which obtains within each jurisdiction. (*Noyes: Intercorporate Relations,* Par. 337.) While this rule leads to more or less conflict of decision this conflict is more apparent than real, for it is the public policy of each jurisdiction which declares what is a reasonable restraint and what is not. In some states the competitive principle is regarded as sacred, sweeping statutes to protect it have been enacted, and courts have been quick to condemn anything which affords an opportunity or merely tends to invade it. In other states freedom to contract and the inviolability of contracts when made are regarded as much a matter of sound public policy as the principle of competition, and contracts will not be condemned unless it affirmatively appears that the public will inevitably and necessarily be harmed by their enforcement.

In the case at bar these are Washington contracts and are to be measured by the law and public policy of this state. The public policy of Washington is not to be determined by the economic, political or personal opinions of the individual who sits as judge to hear the cause but by the constitutional provisions, statutory enactments and judicial decisions of the jurisdiction where the contracts were made and within which they were to be performed. We have shown clearly that the constitution of Washington contains nothing, express or implied, to taint these contracts. It is equally clear that although the legislature has twice considered the subject matter, there is no legislation which brings these contracts within its scope. The decisions of the Washington courts contain nothing which brands these con-

tracts as illegal. We have shown that as to contracts in restraint of trade, the rule of reason is the controlling principle of decision. The same rule of reason has been adopted as to contracts in restraint of competition. In *Fisher Flouring Mills Co. vs. Swanson,* 76 Wash. 649, the plaintiff manufactured a brand of patent flour and sold it to defendant on condition that he maintain plaintiff's fixed minimum retail prices. For a breach of the condition suit was brought to which defendant's demurrer was sustained by the trial court. On appeal the court below was reversed. After a careful consideration of all of the features of the case the rule is substantially stated as follows: Contracts incidental to some main contract, not proceeding from or tending to create and maintain a monopoly, will be maintained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties and of the public. It may be noted that neither the court nor the parties considered this case as within any constitutional provision or statutory enactment of Washington, but it was presented, considered and decided under common law principles.

Measuring these Washington contracts in the case at bar by Washington law, it seems absurd to find them illegal, and equally absurd to refuse to enforce them.

The citation of decisions in other jurisdictions is unnecessary and may lead to confusion. We have called to the attention of the court many cases which bear upon the question and there are many others which support the rule adopted in Washington. In discussing the questions raised by the first assignment of error we have

cited several cases which bear directly upon the question now under consideration. We refer the court particularly to:

Trenton Potteries Co. vs. Olyphant;
Davis vs. Booth & Co.;
Metcalf vs. American School Furniture Co.;
Diamond Match Co. vs. Roeber;
Camors-McConnell Co. vs. McConnell;

Other cases which support our contentions are:

Cincinnati Packing Co. vs. Bay, 200 U. S. 179 s. c. 50 Law Ed. 428.

Oakdale Mfg. Co. vs. Garst, 28 Atl. (R. I.) 973.

Hubbard vs. Miller, 27 Mich. 15, s. c. 15 Am. Rep. 153.

Mutual Life Ins. Co. vs. Durden, 72 S. E. 297 (Georgia).

Stromer vs. Van Orsdel, 103 N. W. (Neb.) 1053.

Sweigert & Howard vs. Tilden, 21 Iowa 650.

Central Shade Roller Co. vs. Cushman, 143 Mass. 353, s. c. 9 N. E. 629.

Printing Co. vs. Sampson, L. R. 19 Eq. 462.

Cincinnati Packing Co. vs. Bay et al, 200 U. S. 179, was a sale by Bay of certain craft employed on the Ohio river on deferred payments, coupled with agreements that the purchaser should not be required to pay the installments if competition developed which cut prices as long as such competition continued; and agreements of the vendors not to enter into competition; and an agreement of vendees to maintain the established rates.

The Ohio courts found the agreements valid but certified to the Federal Supreme Court the question whether or not the restrictions were within the Sherman act as restraints of interstate commerce. This question the Supreme Court decided in the negative; but in the opinion states principles of value here. Asserting that the court will not assume facts to render a contract illegal, the court, through Mr. Justice Holmes, says: "A contract cannot be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts * * * We will suppose then that the contract does not leave commerce among the states untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. * * * The chief and visible object of its provisions has nothing to do with commerce among the states. That which suspends payment of installments in case of serious opposition is security against a losing bargain, not a combination to gain a monopoly." Speaking of the agreement of the vendees to refrain from competition, the opinion says: "The price was paid not for the vessels alone but for the vessels with the covenant. * * * Presumably all there was to sell, besides certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names. This being our view of the covenant in question * * * we believe that such a contract, made as a part of the sale of a business, and not a device to control commerce, would not fall within the act. On the contrary, it has

been suggested repeatedly that such a contract is not within the letter or spirit of the statute. (Citing cases.) It would accomplish no public purpose but would simply provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller, necessary in order to give the sale effect, were to be declared illegal in every case where a nice scrutiny could discover that the covenant might possibly reach beyond the state line. * * * It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such a ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for that which was the consideration of his debt, and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases." Here the respondents ask this court to follow the court below into a mere suspicion that the contracts in suit had for a dominant purpose the creation of a monopoly. They ask your Honors to import a strained meaning to the constitutional provision, and to exercise a nice scrutiny and judicial astuteness, not to uphold honest contracts and obligations, but to avoid them. We think that the acumen of this court should, if necessary, be employed to bring about an opposite result. One thing is at least clear from the opinion we

have cited. The purchase of a competitor's *competition* is a valid transaction when ancillary to a sale.

Oakdale Mfg. Co. vs. Garst, 28 Atl. (R. I.) 973, was an agreement among four manufacturers to consolidate in one corporation, which was attacked as in restraint of competition. The court held the agreement valid and said: "It does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is illegal. Such a rule would produce a greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not injurious to the public." This excerpt from the opinion seems to cover the case at bar. Granting, for the argument, that the number of competitors was diminished, it was a sale between those engaged in a common business. It secured economy of administration. It was beneficial to the parties and not injurious to the public. It was in accord with the familiar course of business. There was no *purpose or intent* to accomplish an illegal end, which the Supreme Court of the United States in *Swift vs. U. S.,* 196 U. S. 375, held to be of the very essence of the question, saying: "Intent is almost essential to such a combination (i. e., in restraint of commerce). Where acts

are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen." Indeed the court will note that the constitutional provision in question makes the *purpose* of the agreement the controlling matter.

Hubbard vs. Miller, 27 Mich. 15, holds a contract should be upheld which, considered with reference to the situation, business and object of the parties and in the light of all the surrounding circumstances, appears to be made for a just and honest purpose and for the protection of legitimate interest, and is reasonable as between the parties even though it serves to restrict competition, if such restriction is not specially injurious to the public.

Mutual Life Insurance Co. vs. Durden, 72 S. E. (Ga.) 297. holds it well settled that courts will not void contracts on the ground of public policy except where the case is free from doubt and the injury to the public clearly appears.

Stromer vs. Van Orsdel, 103 N. W. (Neb.) 1053, holds that the enforcement of lawful contracts is a sound public policy of equal importance to the rule which forbids the enforcement of immoral or illegal agreements and that a contract should never be condemned on suspicion, but that its invalidity must appear clearly and without doubt.

Swigert vs. Tilden, 21 Iowa 650, uses this strong argument which applies with force to one aspect of the

case at bar and appeals persuasively to a court of good conscience and fair dealing: "To any one at all familiar with present day conditions it requires no argument to demonstrate that public policy requires that in trade matters there shall be no restraints imposed, save in those instances where it is clearly made to appear that the public welfare would be otherwise seriously endangered. And an all-important factor in business life is the right of individual contract—the right to buy and sell, to bargain and convey at will. The demand for recognition of this, coming up from the world of business, has been heard and countenance given thereto by legislatures and courts everywhere. So, too, note has been taken of the baneful results which follow seemingly with inevitable certainty, from giving sanction even negatively to acts or conduct involving fraud or dominated by bad faith. And certainly it is not going too far to say that there can be no sound public policy which operates to give countenance to the open disregard and violation of personal contracts entered into in good faith and upon good consideration. A recent expression of the English court of appeals on the subject rings true. In *Underwood vs. Barber,* 68 L. J. Ch. Div. 201, it is said: 'If there is one thing more than another which is essential to the trade and commerce of this country, it is the inviolability of contracts deliberately entered into; and to allow a person of mature age and not imposed upon to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken, is *prima facie,* at all events, contrary to the interests of any and every

country.' It has thus come to be the rule of the cases in most jurisdictions that a contract in itself reasonable and based upon a good consideration will be enforced according to the rights of the respective parties thereto, and this notwithstanding it may appear that in some respects or in a limited way the enforcement of such contract has for a result a partial restraint of trade."

Central Shade Roller Co. vs. Cushman, 143 Mass. 353, holds that even though the purpose of an agreement is to regulate competition between the parties, the purpose is lawful. It is only the purpose to impose a burden upon the public which is unlawful; and unless such purpose, coupled with power to carry it into effect, appears clearly, the agreement is valid and courts should enforce it. To hold otherwise would be to impair the right of persons to contract and to put a price upon the products of their own industry.

Printing Co. vs. Sampson, L. R. 19 Eq. 462, states the principle in a form which has been cited frequently (see *9 Cyc.,* 482-483, note): "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing more than another public policy requires it is that men of full age and of competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

It is true that in some jurisdictions, the competitive principle has become a fetich, and sweeping legislation has been enacted to protect it. A mere scent of restraint has set the judicial nostrils a-quiver and judicial condemnation has followed upon political and economic rather than on legal ground. But this fetich has feet of clay which are crumbling rapidly and we are beginning to see that uncontrolled competition is at least as great a public evil as uncontrolled restraint. The principles of law have never followed the popular opinion, but even in the most extreme cases nothing can be found to condemn such contracts as these at bar. We submit that the true rule is stated by the cases we have cited and by leading text writers as follows:

Elliot, Contracts, Vol. 3, Sec. 650: "The law's broad, general statements (as to invalidity of agreements contrary to public policy) are of little value when applied to a concrete case. It must be borne in mind that the public interest is not well served by indulging baseless suspicion of wrong-doing. Public policy forbids the enforcement of any illegal or immoral contract, but it is equally insistent that those which are lawful and contravene none of its rules be duly enforced and not set aside or held invalid on a bare suspicion of illegality. The courts will not declare a contract void on the ground of public policy unless it equally appears that the contract is in violation of the public policy of the State. The doubtful matter of public policy is not sufficient to invalidate a contract. An agreement is not void on this ground unless its contravention of public policy is clear and is manifestly injurious to the in-

terest of the State. Freedom of contract is as essential to unrestricted commerce as freedom of competition, and one who asks the court to put restrictions upon the right to contract ought to make it clearly appear that the contract is against public policy."

Joyce, Monopolies, Sec. 94: "It has been clearly recognized in recent times that public policy is at least as much concerned in holding persons to their contracts as in prohibiting contracts in restraint of trade. * * * Where the business is open to all others, there is little danger that the public will suffer harm from lack of persons to engage in profitable industry. Such contracts do not create monopolies. They confer no special and exclusive privileges."

FIFTH ASSIGNMENT OF ERROR.

This assignment raises the question whether or not the agreements of the Commonwealth Title & Trust Co. were forbidden by the terms of Art. 12, Sec. 6 of the Constitution of Washington, which is as follows:

> *Limitations Upon Issuance of Stock.*—Corporations shall not issue stock except to *bona fide* subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money except for money or property received or labor done * * *

The court below held the agreements of the Commonwealth Title Trust Company were within the inhibition of that clause of the constitutional provision which reads: "Nor shall any corporation issue any bond or other obligation for the payment of money except for money or property received or labor done." The court will recall that in 1909 the entire stock of the Commonwealth Company was owned by the Foggs and Gove; that they, through Franklin Fogg, negotiated the purchase of the plant and goodwill of the Title Insurance and Investment Company of Washington; that, for purposes of their own convenience, they caused to be organized the Title Insurance and Investment Company of Tacoma to take title to the property purchased, and contributed to the security for the payment of the purchase price property of very considerable value which belonged to the Commonwealth Company; that the capital stock of the new company was but $5,000, but the purchasers raised the $10,000 for the initial payment, probably from the resources of the Commonwealth Com-

pany, and, after the purchase practically ignored the new corporate organization and ran the business of both companies as a common enterprise. Frankly, we think it may fairly be inferred from all the circumstances that the convenient purposes of the purchasers in causing the organization of the new company were as follows: (a) To limit the legal liability for the unpaid part of the purchase price to the assets of the new corporation, which consisted of the purchased property and the property contributed to the security by the Commonwealth Company. (b) To secure and protect the goodwill of the business by having it under a name substantially like that of its predecessor. (c) To prevent price cutting and perhaps deter others from coming into the field by the apparent presence of two companies equipped and ready to meet the demand for abstracts. None of these purposes were illegal; all were proper and even laudable; but respondents here now seek to draw about them the mere fiction of a corporate entity as a cloak of protection against the cold wind of contractual obligation.

The court will recall further that in 1911 the abstract business in Pierce County was not prosperous; a new and vigorous company was in the field; business generally was dull; heavy payments were coming due, and the purchasers were sustaining two outfits to do a business which either one could more than do. Again the Commonwealth Company, this time through Horace Fogg, its president, took up negotiations to meet the new situation. They wanted to be relieved of the necessity of keeping up two plants. They wanted to cut down the interest rate. They wanted to extend the

time and method of payment. They got all these things and gave in return an obligation of the Commonwealth Company to guarantee part of the payments. This obligation they now assert was forbidden by the organic law of the State. We do not believe their assertion is sound in law, in equity or in morals.

In no reported case has an attempt been made to apply this or any similar constitutional provision to restrict the power of a corporation to enter into contractual relations by which it obligates itself to pay a debt. If we read the constitutional provision in the light of the ordinary and useful canons of construction, we must read it: "nor shall any corporation issue any bond or other such like obligation for the payment of money," etc., which would of necessity exclude from its operation a contractual corporate obligation of the kind of the case at bar. This reading is sustained by the general text and purpose of the provision, which in terms provides for protection of the investing public against fictitious securities rather than a limitation upon the contractual powers of a corporation. The reason and object is to assure the public, which invests in corporate stocks or bonds, that the corporation has received money's worth for its obligation. It is intended as a protection to the public, and is in no sense a shield by which a corporation may avoid its contractual obligations entered into in the ordinary business of the corporation. It is restricted in its operation to those securities which pass by delivery or endorsement under the law merchant. It is not intended nor can it be held to apply to

a contractual obligation which is not negotiable by endorsement or delivery.

Among the aids to a true construction of the constitutional provision are: A contemplation of the object to be accomplished or the mischief designed to be guarded against. *Cooley: Constitutional Limitations,* 5th Ed. p.79. And the object and purpose of the provision may be gathered from its title and from the context. *Knowlton vs. Moore,* 178 U. S. 41. And its scope and terms may be ascertained by the *ejusdem generis* rule. *Directors of Kittitas Irrig. District vs. Peterson,* 4 Wash. 147; *Vassey vs. Spake,* 65 S. E. 826. Applying these rules it is clear that the clause in question does not include the contracts at bar.

Memphis etc. Ry. vs. Dow, 120 U. S. 287; s. c. 30 Law Ed. 595.

Continental Trust Co. vs. Toledo Ry. Co., 83 Fed. 642.

Coe vs. East etc. Ry., 52 Fed. 531.

Mackintosh vs. Flint etc. Ry., 34 Fed. 583.

Brown vs. Duluth etc. Ry., 53 Fed. 889.

Atlantic Trust Co. vs. Woodbridge, 79 Fed. 842.

Sioux City etc. Ry. vs. Manhattan Trust Co., 92 Fed. 428.

Krantzenstein vs. Lehman, 44 N. Y. Sup. 269.

Shirk vs. People, 121 Ill. 61.

St. Paul Fire etc. vs. Penman, 151 Fed. 969.

Jewell vs. Nuhn, 138 N. W. (Iowa) 457.

Bank of Willows vs. Glenn County, 101 Pac. (Cal.) 13.

Memphis Railroad Co. vs. Dow, 120 U. S. 287, is a leading case and the only case in which the construction of any similar constitutional provision has reached the Supreme Court. There the question arose under the Arkansas Constitution which provides that no corporation shall issue stock or bonds except for money, labor done, or property actually received. The court considered the provision largely in the light of the objects and purposes to be obtained thereby. We feel strongly that the Washington Constitution must be read in the same light. We therefore quote freely from Mr. Justice Harlan's opinion:

> "The prohibition against the issue of stocks or bonds except for money or property actually received or labor done, and against fictitious increase of stock indebtedness, was intended to protect the stockholders against spoilation and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stocks and bonds that do not represent anything whatever of substantial value."

The opinion then cities with approval *Peoria Ry. Co. vs. Thompson,* 103 Ill. 201:

> "The object was doubtless to prevent reckless and unscrupulous speculators under the guise or pretense of building a railroad or of accomplishing some other legitimate purpose, from fraudulently issuing or putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy, the stocks or bonds in such cases being entirely fictitious."

Further considering the same matter, Mr. Justice Harlan continues:

> "Recurring to the language employed in the Arkansas constitution, we are of the opinion it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear from the words used that the framers of that instrument intended to restrict private corporations—at least, when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property or labor, upon such terms as they deem proper, provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property rights, and privileges in question, for a given amount of its stock and bonds falls within the prohibition of the state constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders."

Continental Trust Co. v. Toledo Ry. Co., 83 Fed. 642, was an opinion by Judge Taft approving a railroad re-organization on the authority of *Memphis vs. Dow.* On appeal Judge Lurton affirmed Judge Taft, referring to Memphis vs. Dow as a controlling authority. (See 95 Fed. 497).

Coe vs. East etc. Ry., 52 Fed. 531, construes the provision of the Alabama constitution, citing *Memphis vs. Dow* as a controlling authority.

Mackintosh vs. Flint etc. Ry., 34 Fed. 582, construes a Michigan statute in the light of *Memphis vs. Dow* and cites it as a controlling authority.

Brown vs. Duluth etc. Ry., 53 Fed. 889, puts a similar construction on a Minnesota statute on authority of *Memphis vs. Dow.*

Atlantic Trust Co. vs. Woodbridge etc. Co., 79 Fed. 842, construes the California constitutional provision, citing and relying on *Memphis vs. Dow.*

Sioux City etc. Ry. vs. Manhattan Trust Co., 92 Fed. 428, construes the Nebraska constitutional provision and holds *Memphis vs. Dow* a controlling authority.

Krantzenstein vs. Lehman, 44 N. Y. Supp. 369, was under a statute providing that a levy on personal property such as a bond, promissory note or other instrument for the payment of money, must be by taking the same into actual custody. Held, that the phrase "other instrument for the payment of money" must be interpreted as referring to instruments of similar character to bonds and notes which pass by delivery and would not include an insurance policy.

Shirk vs. People, 121 Ill. 61, was a prosecution under a criminal statute for uttering forged notes, checks, bills, etc., or "other instrument in writing for the payment of money." Held, to include only writings of the class mentioned for the absolute and unconditional payment of money.

St. Paul Fire etc. Co. vs. Penman, 151 Fed. 969, in opinion by Holland, J.: "Where a staute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that the person or things therein comprised may be read as the same with, and not of a quality superior to, or different from those specifically enumerated."

Jewell vs. Nuhn, 138 N. W. (Iowa) 457. Its articles provided that a Building & Loan Company should have a lien upon the shares of each stockholder for any sum due it "for subscription, money loaned, or any other indebtedness due from the shareholder" held, under the *ejusdem generis* rule, the company had no lien upon the stock of a defaulting officer.

Bank of Willows vs. Glenn County, 101 Pac. (Cal.) 13. Under California constitution, Article 13, paragraph 4, providing that a mortgage, deed of trust, contract, "or other obligation by which a debt is secured" shall, for the purpose of assessment or taxation, be deemed an interest in the property thereby affected, does not, under the *ejusdem generis* rule, include a collateral security on a loan of personalty.

It appears then that the rule is established that these similar constitutional provisions are confined in their operation to fictitious securities which pass by delivery or endorsement in the public markets. The rule is stated by *Clark & Marshall*: *Private Corporations,* Vol. I, p. 485:

"The prohibition, however, is not to be construed so as to restrict and hamper corporations in the management of their legitimate business or in procuring the means to accomplish their legitimate objects. To bring a case within the prohibition, it must appear that the corporation has fraudulently issued, or is about to fraudulently issue and put upon the market, bonds which do not represent and are not intended to represent money or property received."

In *Chavelle vs. Washington Trust Co.,* 226 Fed. 400, Your Honors had under consideration the constitutional provision in question. You held in that case that a pledge of corporate bonds as additional collateral to secure an antecedent indebtedness was within the constitutional inhibition; but also held that as these securities passed by delivery, such of the bonds as were in the hands of innocent purchasers for value were valid whether valid in the hands of original holders or not. The case arose in bankrutpcy and was between the trustee for the creditors and the holders of the securities. It touches no question presented by the case at bar, although it was cited to and relied upon by the court below to sustain its findings.

It is true that the words "or other obligation" are not within many of the constitutional provisions; but it is a strange interpretation which gives to this phrase an effect which puts aside the rule which so generally obtains throughout the land. Three states—Washington, Arizona and Utah—contain this phrase in their constitutional enactments; but in none of them has any attempt been made to give to it any force or meaning beyond

that which the *ejusdem generis* rule would require. (See Arizona Constitution, Art. 14, Sec. 6; Utah Constitution, Art. 12, Sec. 5).

If the constitutional provision is to be broadened to include obligations which do not pass by delivery and endorsement, it must be on the theory that the stockholders of a corporation are to be protected from impairment of the corporate trust fund. Since this would be a provision for their protection alone, the stockholders could waive it, or by a course of conduct could estop themselves from claiming it. Here there is no right of creditor involved. The corporation itself and its stockholders claim the benefit of the provision. The corporation has estopped itself by reciting in its agreement the consideration flowing to it (See record, p. 25, Exhibit B) and by its further recitals in its corporate resolution (See record, p. 58, Exhibit 3). Its stockholders have estopped themselves thrice over; first, by accepting the cancellation of the old mortgage and the surrender of the old series of notes; second, by all joining in the meeting of the Commonwealth Company at which the contract of guaranty and the accompanying mortgage was authorized; third, by all joining in the individual guaranty of the validity, force and effect of the Commonwealth Company's agreements.

Cooley: Constitutional Limitations (5th Ed.), p. 216.

Mutual Life Ins. Co. vs. Durden, 72 S. E. (Ga.) 297.

Ferguson vs. Landram, 5 Bush. (Ky.) 230.

Reid vs. Field, 82 Va. 26.

30 Cyc. 254, sub. nom "Waiver."

Cooley: *Constitutional Limitations,* p. 216 (5th Ed.) sub. nom. *"Waiving a constitutional objection*: "There are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will. * * * And where parties were authorized by statute to erect a dam across a river, provided they should first execute a bond to the people conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam, the damages to be assessed by a justice of the peace, and the dam was erected and the damages were assessed as provided by the statute, it was held in an action on the bond to recover those damages, that the party erecting the dam and who had received the benefit of the statute, was precluded by his action from contesting its validity, and could not insist upon his right to a common law trial by jury. In these and like cases the statute must be read with an implied proviso that the party to be affected shall assent thereto; and such consent removes all obstacles and lets the statute in to operate the same as if it had in terms contained the condition."

Mutual Life Insurance Co. vs. Durden, 72 S. E. 297, (cited *supra* upon another point) was a suit upon an insurance policy. A statute of Georgia provides that an insurer shall not be liable on the policy in case the in-

sured commits suicide. The policy contained a clause that the insured should not be liable in case the insured, sane or insane, committed suicide within a year. The insured had committed suicide, but not within the year. The trial court and the appellate court sustained a recovery on the policy, holding that the statute was for the benefit of the insurer, that its protection could be waived and had been waived by the terms of the policy.

In *Ferguson vs. Landram,* 5 Bush (Ky.) 230, it is held that one who has co-operated with others in securing legislation will be held to have waived any objection he might have raised when he is charged with its burdens.

Reid vs. Field, 82 Va. 26, holds it is a recognized principle of law and equity that one may waive a right guaranteed by law for his protection if his waiver is without detriment to the community at large.

In 40 Cyc. 254 et seq. it is stated that one may by agreement, express or implied, or by a course of conduct, waive a constitutional, statutory or contractual right; and a multitude of cases are cited to sustain these propositions.

Considered in this light the contracts of the Commonwealth Co. were no more than *ultra vires,* and certainly the corporation and those interested in it would be estopped under the facts of the case. The full benefit of the executed contract has been received, and it is not now possible to return to the vendors the goodwill and security of a going concern which five years of inactivity has destroyed.

Omaha Hotel Co. vs. Wade, 7 Otto 13; s. c. 24 Law Ed. 917.

Union Nat'l Bank vs. Matthews, 98 U. S. 621; s. c. 25 Law Ed. 188.

Hitchcock vs. Galveston, 96 U. S. 341; s. c. 24 Law Ed. 659.

U. S. Sav. & Loan Assn. vs. Convent, 133 Fed. 354.

Barr vs. New York Ry. Co., 125 N. Y. 263.

Tootle vs. First Nat'l Bank, 6 Wash. 188.

Allen vs. Olympia Light etc. Co., 13 Wash. 307.

Spokane vs. Amsterdamsch etc., 22 Wash. 172.

Omaha Hotel Co. vs. Wade, 7 Otto 13, was a case where stockholders had authorized a loan by directors which was both unlawful and onerous. The stockholders were held estopped to deny the validity of the loan.

Union Nat'l Bank vs. Matthews, 98 U. S. 621, is a leading case and holds that where it is simply a question of authority to contract, a party who has had the benefit of the transaction cannot question its validity.

Hitchcock vs. Galveston, 96 U. S. 341, holds that although there may be a defect of power to make the contract, if the corporation has by its promise induced the other party to perform his part of the agreement, the corporation is liable on the contract.

Savings & Loan Co. vs. Convent, 133 Fed. 354, arose in this circuit. The convent sought to set aside its mortgage to the loan association because of the want of power in the convent to purchase stock in the loan asso-

ciation. Your Honors held the defense was not available, and the contract was enforced although in some respects unfair and inequitable. Your Honors also held that the contract was to be measured by the laws and decisions of Washington; and, reviewing the decided cases, summarized them in support of the rule that where a corporation has accepted the benefits of a contact, it is estopped to deny the validity of the instruments by which the benefits came to it.

Barr vs. New York Railway Co., 125 N. Y. 263. In this case the directors of a railway corporation, who were substantially its sole stockholders, caused to be organized another railway corporation to build a projected line of which they were also the officers and sole owners of the stock. As such they entered into a construction contract which called for the exchange of an exorbitant sum in mortgage bonds and stock, for the construction of the proposed line, and through an assignee, personally received the benefit from the same. After construction, they caused the first company to become the lessee of the second company under a rental agreement which guaranteed the payment of interest on the stocks and bonds so issued. Thereafter they lost control of the lessee company, and of much of the bonds and stock of the lessor company. In a suit to compel the lessee to pay the guaranteed rental, it was held that although both the construction contract and the lease were invalid, yet as at the time they were made, all the parties in interest had consented thereto, all such parties and both corporations would not be heard to assert its invalidity.

We do not concede that the Commonwealth Co. did not receive money's worth for its agreement of guaranty. It had property at stake liable to be foreclosed and lost. It was relieved of the burden to its business caused by the expenses of an unnecessary plant. Its business was relieved of the burden it was carrying of a large debt at a high rate of interest and due in substantial payments. These were property within the definition that all which may afford a valuable consideration constitutes property, corporeal or incorporeal. It is idle to assert that in truth and in fact the interest represented in the Commonwealth Co. and the interest represented in the Title Insurance and Investment Co. of Tacoma were not one and identical. It was one interest which made the purchase in 1909. It was one and the same interest which modified the terms of the purchase in 1911. While at law the theory of legal corporate entities may control, equity will always go behind it to seek out the real parties and the real interests and will never permit the fiction to accomplish a wrong or bring about injustice.

United States vs. Lehigh Valley Ry., 220 U. S. 257; s. c. 55 Law Ed. 458.

United States vs. Milwaukee Refrig. Transit Co., 142 Fed. 247.

Higgins vs. Cal. Petro. and Asphalt Co., 122 Cal. 373; s. c. 55 Pac. 155.

Bennett vs. Minott, 28 Ore. 339; s. c. 44 Pac. 288.

United States vs. Lehigh Valley Ry., 220 U. S. 257, was a prosecution under the "Hepburn Act." The railway company had organized the Lehigh Valley Coal

Company and operated it "as an agency, or dependency, or department of the railway company." The trial court, holding to the theory of corporate entities, refused to permit allegations showing the identity of interests of the corporations. The Supreme Court swept aside the fiction for the reality, and restrained the railway from transporting its dependent company's coal.

United States vs. Milwaukee Refrigerator Transit Co., 142 Fed. 247, arose in the Sixth Circuit. The Pabst Brewing Co. had caused the Transit Company to be organized to take over its transportation business but the corporations were identical in interest. The case arose under the Elkins Act. Judge Sanborn said: "If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of a legal entity is used to defeat the public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. This much may be expressed without approving the theory that the legal entity is a fiction * * *"

Higgins vs. Cal. Petroleum & Asphalt Co., 122 Cal. 373. A corporation held a lease under which it mined asphalt on royalty. Its stock was owned substantially by one person, who organized a new corporation with the same officers, objects and place of business, and took all its stock on the sole consideration of a debt owed to him by the old company, which transferred all its lands, business and assets to the new company, except the min-

ing lease, and practically went out of business. It was held that in equity the new company was the old company under another name and hence was liable for royalties under the lease.

Bennett vs. Minott, 28 Ore. 339, was a case where a debtor had organized a corporation to which he transferred his property. In a suit by his creditors, the argument was that inasmuch as he had taken stock for the full value of the assets which the corporation now owned, the creditor could take only the stock and could not take the assets. The court refused to be bound by the legal rule, saying: "Under these circumstances, although the corporation was organized in due form of law and has a valid corporate existence, the legal rules which regard it as an entity distinct from the real parties in interest, and its stock as property subject to sale under execution, must go down in this attempt to consummate a fraud by legal forms. Equity is not bound by the rules of law in this respect."

See *Spokane Merchants Association v. Clere Clothing Company,* 84 Wash. 616, where an attempt to invoke the corporate entity theory to avoid a debt was not successful. There defendant had organized a corporation whose stock was owned and controlled by its officers. This corporation was held to be the *alter ego* of defendant, the Washington court holding to the rule:

> "Courts no longer hesitate to look through form and substance and ignore a mere colorable corporate entity, to the end that rights of third parties may be protected."

SIXTH ASSIGNMENT OF ERROR.

If the court should find that the agreements of the Commonwealth Co. are fairly within the inhibition of the constitution, it does not follow that the individual warranty of the individual defendants should not be enforced against them. The acts which the constitution prohibit are not *malum in se.* The powers which the constitution says that corporations shall not exercise are powers which natural persons exercise in the ordinary course of business. No one would attempt to assert that an individual may not lend his credit or make such guaranties as he pleases. In any event, the constitutional provision means no more than that corporations are under a disability in this respect, as an individual like a minor, or insane person may be incapacitated. It appears that when the contracts were made, there was some doubt in the minds of the parties as to the power of the Commonwealth Co. to make these agreements. That doubt, the appellant says, was whether or not the contracts were *ultra vires,* and the guaranty was given to remove that doubt and create an estoppel, which would undoubtedly be its legal effect at least. The respondents assert that the doubt was as to the validity of the agreements, not as to the power of the corporation in the premises. If the position of the respondents is correct and their defense in this respect is good, then all the parties were doing a vain and empty act. It is conceded that able and experienced counsel were engaged on both sides, and it seems unreasonable that the then mortgagees should surrender a good, valid and sufficient security for one open to such serious question.

If the constitution merely places corporations under a disability as to agreements and obligations like those at bar, then the guaranty of the individuals comes into full force and effect. It was a guaranty that the corporation had in fact the capacity to make the agreements; that the corporation had received good and sufficient consideration therefor, and that its agreements were binding upon the corporation. Its wording was as follows:

"The undersigned, Fred S. Fogg, Herbert H. Gove, Horace Fogg and Franklin Fogg, in consideration of the accepting of the foregoing guaranty and agreement by the said Traders Trust Company of Oregon, and other valuable considerations, do hereby agree and guarantee to and with the Traders Trust Company of Oregon, that the foregoing guaranty and each and every part thereof is based upon a valuable consideration, sufficient in law to bind the Commonwealth Title Trust Company, and that the same is a valid and subsisting obligation of said company."

If words have any meaning, certainly the individual guaranty has the force and effect we claim for it. If the individuals who made it did so, not merely to guarantee against an *ultra vires* act but to insure the other parties against the failure of the agreements by reason of the constitutional provision (and such is their testimony; see record, pages 129-130) and to induce the other parties to rely upon the binding force and effect thereof (and such is the effect of their recitals; see record, second "whereas" clause, p. 25; recital in agreement of individuals, p. 29; recital in corporate resolution of Commonwealth Title Trust, p. 58; testimony of

Fred S. Fogg, pages 129-130) then the equities are still stronger in favor of the guaranty against the guarantors. The case falls squarely within the doctrine of waiver which we have hereinbefore pointed out, and the court will be quick, under the circumstances, to apply it.

The disability of the principal debtor is no defense to the guarantor, for indeed this may be the very reason, as in the case at bar, why the guaranty is given. The common form of guaranty is that, if the principal does not pay, the guarantor will. This is not the common form. Here the guarantors in effect say that the principal shall be forced to pay over and above any objection which the guarantors or anyone else may raise. In disregard of their guaranty, the individual defendants now ask the court to join them in disregarding their solemn engagements. Here again the respondents take a position which equity does not favor.

There can be no basis for reasonable argument that to issue a bond or other obligation for the payment of money, except for money or property received or labor done, is to do that which is inherently vicious or dishonest. If it were otherwise, the kindly impulse which leads a man to stand good for the debt or default of his friend, would come under the ban of the law. Under any theory, the constitutional provision merely incapacitates a single class, viz.: corporations, from exercising a power that all other classes exercise at will, for there is no limitation at law upon natural persons, acting in their own right, from entering into such obligations as they please, or guaranteeing what they will for others,

provided the subject matter of the obligation or guaranty is not inherently vicious. Only an inherent vice can relieve a guarantor of his obligation; for it is a universal rule of law that a guarantor is not relieved by any disability which is personal to his principal. Thus one who guarantees the undertaking of a minor; or, in the common law states, of a married woman; or of an insane person, or any natural person under a disability which runs to his capacity to make the contract, is not thereby relieved of liability upon his guaranty. The want of power in a corporation to make a given contract stands upon the same footing as the incapacity of an individual; indeed, the doubt of the corporate power may be the very reason, as in the case at bar, why the guaranty is required.

Backus vs. Feeks, 71 Wash. 509.

Yorkshire Ry. Wagon Co. vs. McClure, 19 Ch. Div. 478; S. C. 51 L. J. Ch. 259.

Remsen vs. Graves, 41 N. Y. 471.

Mitchell vs. Hydraulic Stone Co., 129 S. W. (Tex.) 148.

Jones vs. Thayer, 12 Gray (Mass.) 443.

Brandt: Suretyship and Guaranty. Pages 334 and 352.

Backus vs. Feeks, 71 Wash. 509, holds that the guarantors of a contract, not inherently vicious, are bound by their guaranty even though the contract cannot be enforced against the principal. This case stands as the *lex loci contractus.* It cites with approval the Yorkshire Railway Wagon case and Mitchell vs. Hydraulic Stone Co. (infra).

Yorkshire Ry. Wagon Co. vs. McClure, 19 Ch. Div. 478, was a case where a railway company attempted to incur *an indebtedness in a manner expressly forbidden by an Act of Parliament.* Individuals guaranteed the contract. The guarantors were held to their undertakings, there being nothing inherently vicious in the principal contract; although as to the railway company the contract was absolutely void.

Mitchell vs. Hydraulic Stone Co., 129 S. W. (Tex.) 148, holds the sureties on a corporate contract which the corporation had no power to make and as to which the contract was void.

Remsen vs. Graves, 41 N. Y. 471, holds that one who guarantees a bond thereby estops himself from asserting, in an action on his guaranty, that the makers of the bond were not competent to contract in the manner that the principal undertaking shows that they did.

Jones vs. Thayer, 12 Gray (Mass.) 443, holds that it does not lie in the mouth of a guarantor to say that the undertaking which he guarantees is not a valid and subsisting obligation.

Brandt: Suretyship and Guaranty, pp. 334 and 352, states the rule tersely: "A surety is not entitled to every exception which the principal debtor may urge. He has a right to oppose all which are inherent to the debt, but not those which are personal to the debtor. * * * If the invalidity of the contract rests upon reasons personal to the principal, the principal acquires a personal defense against the contract; but the contract subsists and the sureties may be charged thereon. The disability of the principal may be the very reason why the surety was required."

SEVENTH ASSIGNMENT OF ERROR.

The agreement of mortgage and pledge by the Title Insurance and Investment Co. of Tacoma to the Traders Trust Company of Oregon, contains the following provision (Italics are ours) see record, p. 23, par. 5:

> "Time shall be and is of the essence of this agreement and in the event of the failure of the first party *to pay any of the said notes at the time specified in said notes,* or to pay any taxes which the first party agrees to pay, and after the continuance of such default for the period of one (1) year, then the whole of said notes shall, at the option of the second party, forthwith and without notice, mature, and the second party shall be entitled forthwith to foreclose said pledge. Defaulted interest shall bear interest at five (5%) per cent per annum from the default until paid."

The principal of the first of the notes fell due December 7th, 1915.

This suit was begun February 8th, 1916, which was less than one year after default of the principal of said first note.

The notes referred to in the agreement aforesaid were similar in tenor and effect, except as to time of maturity, and are as follows: See record, p. 144:

"$2500.00

Tacoma, Wash., December 2nd, 1911.

On or before December 7th, 1915, after date, without grace, we promise to pay to the order of the Traders Trust Company of Oregon, Two Thousand Five Hundred and no/100 Dollars in

Gold Coin of the United States of America of the present standard of value with interest thereon in like Gold Coin at the rate of five per cent per annum from date hereof, until paid, for value received. *Interest to be paid semi-annually at Tacoma and, if not so paid, the whole sum of principal and interest to become immediately due and collectible, at the option of the Holder of this Note.* And in case suit or action is instituted to collect this Note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, a reasonable sum..... Dollars in like Gold Coin for attorneys' fees in said suit or action.
Due Dec. 7th, 1915.

The Title Insurance and Investment Co. of Tacoma.

By H. H. Gove, P."

The agreement of Guaranty of the Commonwealth Title Trust Co. contained the following clauses: See record, pp. 26 and 27.

"The said Commonwealth Title Trust Company does hereby guarantee to and with the Traders Trust Company of Oregon, the payment of the first seven of said notes and each and every of said seven notes in accordance with their terms and conditions, *and further guarantees to and with the said Traders Trust Company of Oregon, the payment of the interest in accordance with the terms of each and all of the thirty-two (32) notes referred to above, at the times specified in each of said notes,* down to and including the interest maturing December 7th, 1921 * * *

"It is further agreed, that time shall be and is of the essence of this agreement of guaranty, and in the event of any failure or default *in any payment hereby guaranteed to be made* and of the continuance of such default for a period of ninety days, after written notice thereof to the guarantor in writing, the Traders Trust Company of Oregon, its successors or assigns, may bring a proper action against such guarantor, *and in the event of the continuance of such default for a period of one year,* after such default shall have been made, *then the whole amount covered by this guaranty shall forthwith and without notice become due and payable,* at the election of said Traders Trust Co."

The interest payment due December 7th, 1914, in the sum of $2,000 was defaulted (See record, complaint, Par. IX, p. 8; answers, Par. VI, p. 37; answers, Par. VI, p. 63) and due notice was given thereof (See record, Par. IX, p. 90). Suit was not brought until more than a year after this default.

The mortgage given by the Commonwealth Title Trust Co. to the Traders Trust Company of Oregon, contains the following provision: See record, p. 32.

"*Upon any default* on the part of the party of the first part in the *payment of principal or interest when due* or in keeping and performing any of the above agreements and the continuance of such default *for one year,* said party of the second part, its successors or assigns, may elect to declare all sums secured hereby due and payable without notice, including the then value of the unpaid guaranteed interest figured on the

basis of 5%, and including on all defaulted interest at 5% per annum, and *may immediately* cause this mortgage to be foreclosed in the manner provided by law, whether he or they shall elect to pay any of the sums above referred to or not."

These agreements were made at the same time, between the same parties, upon the same subject matter, and substantially as one transaction. It is true that the several corporate bodies were the formal parties to the agreements, but the testimony is clear that the negotiations were conducted and the agreements were reached by the Foggs and Gove on the one side and Smith and Willoughby on the other. The apparent difference in the agreements as to the time when the debt matures is one of form rather than of substance, and clearly arises from an inadvertence on the part of the scrivener who drew the agreements rather than any failure of the minds of the parties to meet as to this one feature of the agreements. It will be noted: (a) The *notes* which evidence the principal debt provide that the *interest* shall be paid semi-annually at Tacoma, and, if not so paid, the *whole sum of principal and interest* shall become immediately due and payable at the option of the holder. (b) The *contract of guaranty* provides for and guarantees the payment of the *principal sum* in accordance with the terms of the notes, and further guarantees by a separate and distinct clause the payment of the *interest* in accordance with the terms of the notes. It further provides that time is of the essence of the agreement, and in the event of *any failure or default in any payment* guaranteed, and the continuance

of such default for one year, then the *whole amount* covered by the guaranty shall forthwith and without notice *become due and payable.* (c) The mortgage given by the Commonwealth Co. provides that upon *any default* in the payment of *principal or interest* and the continuance of such default for one year, *all sums* secured by the mortgage shall become *due and payable without notice.* (d) Of all the agreements in writing, the mortgage and pledge of the Title Insurance and Investment Company of Tacoma alone *omits* to state in terms that a default in payment of interest shall mature the debt. It does not contain any expressly contrary provision, but merely omits specifically to mention a default in interest. It does not even mention specifically the *principal* of the notes, but contents itself by reciting: "In the event of the failure of the first party to pay any of said notes at the time specified." If the word had been: "To pay the principal" of said notes, the respondents' case would have been stronger, but not even then controlling. If, of course, the wording had been as it was in every other instance in the writings: "To pay the principal and interest," then there would be no possible ambiguity. It would seem that since the clause refers to the payment of the "notes" the parties must have meant in accordance with the payments which the notes themselves called for, which specifically require the payment of interest semi-annually and further provide for immediate maturity of the principal and interest, if not paid.

The court below held the suit premature as to the foreclosure of the mortgage and pledge of the Title

Insurance and Investment Company of Tacoma, giving to the provision which we have pointed out controlling importance and interpreting it to mean that no suit could be brought prior to December 7th, 1916; ignoring all other writings, within or without the agreement of pledge, and refusing to consider any apparent ambiguity. In this the court was clearly in error.

Bell vs. Engvolsen, 64 Wash. 33.

Grand Island Association vs. Moore, 59 N. W. (Neb.) 115.

Black vs. Reno, 59 Fed. 917.

Bell vs. Engvolsen, 64 Wash. 33, presented for determination the same question as the case at bar. The note provided for interest at a certain rate until paid. The mortgage provided for interest at the same rate until paid, payable semi-annually, and provided further that in case of default of principal or interest foreclosure could be had. It was contended that the mortgage could not operate to enlarge the terms of the note and nothing was due until the maturity of the note. In that respect the case was the opposite of the case at bar. But the court upheld the rule for which we contend here, saying: "When a note is made and a contemporaneous writing is made to secure or qualify it, the two instruments, *when not conflicting,* will be construed together so that effect may be given to both. The purpose of the court is to gather the intent of the parties, not from one writing, but from all of them. * * * There being no conflict in the terms of the two writings, and the intention of the parties to pay

interest semi-annually being manifest, the whole debt, by reason of this default, became due, and the decree was properly entered." In the case at bar there is no conflict between the notes and the agreement. The agreement merely omits to set out all that the notes contained. The authority cited is the *lex loci contractus* and is controlling.

Grand Island Association vs. Moore, 59 N. W. 115, reviews the law, cites many authorities and holds: "The last objection made was that the proceeding was premature. The note was made payable on or before March 23rd, 1892, with the following provision: 'The payer has the option of paying the interest as above at the end of each year, or of having it added to the principal, to draw thereafter the same rate of interest.' The mortgage provided that if the mortgagors should fail to pay the money when due, or to pay taxes or insurance, or to pay the dues and fees on the stock as they became due, then the plaintiff might elect to pay the same, and declare the whole amount due and payable at once. * * * In this state it has been determined that in deciding such questions the note and mortgage should be construed together. (Citing cases.) *Buchanan vs. Insurance Co.* was a case much like that before us. A personal judgment had been rendered in the foreclosure case, and it was there held that the provision in the mortgage should be construed in connection with the note, and that a failure to pay interest coupons entitled the mortgagee to a personal judgment for the whole debt. *Bank vs. Peck* was a suit upon notes under similar conditions. The court there held,

under an opinion by Brewer, J., that the notes and mortgage were to be construed together, that all notes became due upon a failure to pay one, and that the statute of limitations ran against all from that time." * * *

Black vs. Reno, 59 Fed. 917, holds as follows: "It is objected that this action is premature for the reason that, by the terms of the mortgage deed, no foreclosure is permissible until after the maturity of the ten-year note. The first note and all of the interest thereon were past due when this suit was instituted. If this action is to be postponed * * * the situation of the creditor is most unfortunate. * * * Before a court of equity would give a construction to the mortgage productive of such dire results, it should clearly appear on the face of the mortgage deed that it was within its terms that the mortgage should be so postponed. Of course a court of equity could not, in this action, afford relief against the express contract of the parties. The courts universally hold that, under a mortgage to secure a debt payable in installments, the right to foreclose arises on a default in any one installment; and there is a strong disposition and tendency in the courts of chancery to apply this rule to defaults in the payment of annually accruing interest, in the absence of any provision clearly interdicting the right. *2 Jones: Mortgages, Secs. 1176-77.* They combat the position, often taken by counsel, that such interest ought not to be considered in the light of an installment of principal, but they assert that interest unpaid becomes principal protanto. In *Seaton vs. Twyford,* L. R. 11 Eq. 591,

the Chancellor, *inter alia,* observed: 'It is not in my opinion open to question that, if the case were taken into chambers for the purpose of preparing a mortgage deed, under such decree as I have mentioned, the mortgage would not be in the most ordinary form, giving five years to pay the mortgage money, but making it a condition of that postponement that the interest, in the meantime, should be paid. The failure to pay the interest in a mortgage prepared in the most ordinary form would release the mortgagee from the necessity of waiting five years before he exercises such powers as a mortgagee possesses. The mortgagor who stipulates that he shall have five years to pay the mortgage must, of necessity, whether it is expressed or not, undertake at the same time that, if he fails to do that which is incumbent upon him during the period of five years to do, the restrictions upon the mortgagee (that is, to wait five years on the mortgagor) should cease.' "

Finally, the court below refused to take into consideration the fact that defendants below had refused to pay the debt or any part of it, not because there was a payment then due, but because they declared there was no debt. (See record, testimony of Horace Fogg, p. 136.) They had been advised by counsel that the agreements were void, and they had accepted the advice and were acting under it. Under such circumstances they again appear in a poor light to plead that they were brought into court too soon.

Coley vs. Mills, 100 Pac. (Ky.) 69.

1 Cyc. actions 742.

EIGHTH ASSIGNMENT OF ERROR.

We believe that we have shown clearly that the court below was in error in each and every of the matters heretofore presented. Having once turned its back to the true light, the court went further and further into the darkness. *Facile descensus Averno.*

At the threshold of the case, the court imputed to all the parties, unsupported by any testimony and in fact in the face of the direct statements of the defendants, a sinister purpose to impose upon the people of Pierce County a monopoly of the preparation of abstracts of title, and found all subsequent dealings were tainted by reason thereof. The court ignored the statutes and decisions of the State of Washington relating to the nature of abstracts of title, took in place thereof an obsolete definition from a dictionary and a statement from Shakespere, who was a better joker than a jurist. On this basis the court gives to monopoly a meaning which would more than satisfy a middle-of-the-road populist, and sets aside contracts solemnly entered into by intelligent, prudent and careful business men. To the two constitutional provisions of the State of Washington, the court gives a strained construction, stretching them upon the bed of Procrustes, the famous robber of Eleusis, who placed his victims upon a bed and lopped off or stretched their limbs to make them fit the couch on which he wished them to lay. This method must make cripples of those who should be the sturdy in the world of business. Proceeding further, the court emasculates the guaranty of the individual defendants, which was an evidence of their good faith at least, if it

was anything at all. Finally, the court declared the subject still-born and left all further matters to the undertaker. In all these matters the court from the beginning to the end gives no weight to and does not even discuss or distinguish the rules and decisions of Washington which control the interpretation of these agreements. The decree should be reversed.

NINTH ASSIGNMENT OF ERROR.

The decree should be reversed with instructions to the court below to enter a decree as prayed for in the complaint, which is strictly in accordance with the agreements of the parties. (See record, p. 27.)

In addition, the parties having so stipulated (see record, p. 115), the decree should provide that the defendant Commonwealth Title Trust Company shall turn over to plaintiff the "take-offs" provided for in the contract within sixty days from the entry of the decree; failing which, judgment against said company in the sum of $20,000 should be rendered as to this item.

Respectfully submitted,

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